

PUBLIC RECORD**Dates:** 30/01/2025; 12/03/2025; 21/03/2025**Doctor:** Dr Thomas HERBST**GMC reference number:** 3270242**Primary medical qualification:** State Exam Med 1988 Freie Universität Berlin**Type of case**

Review - Misconduct

Outcome on impairment

Impaired

Summary of outcomeSuspension, 6 months.
Review hearing directed**Tribunal:**

Legally Qualified Chair	Mr Stephen Killen
Lay Tribunal Member:	Ms Morgan Phillips
Registrant Tribunal Member:	Dr Aneez Esmail
Tribunal Clerk:	Mrs Jennifer Ireland, Mr Andrew Ormsby (21/03/2025)

Attendance and Representation:

Doctor:	Not present, not represented 30/01/2025 & 21/03/2025; Present, not represented 12/03/202
GMC Representative:	Ms Eleanor Curzon, Counsel 30/01/2025; Mr Edmund Potts, Counsel 12/03/2025; Mr Jonathon McCarthy of the GMC 21/03/2025

Attendance of Press / Public

In accordance with Rule 41 of the General Medical Council (Fitness to Practise) Rules 2004 the hearing was held partly in public and partly in private.

Overarching Objective

Throughout the decision making process the tribunal has borne in mind the statutory overarching objective as set out in s1 Medical Act 1983 (the 1983 Act) to protect, promote and maintain the health, safety and well-being of the public, to promote and maintain public confidence in the medical profession, and to promote and maintain proper professional standards and conduct for members of that profession.

Determination on Impairment - 12/03/2025

1. At this review hearing the Tribunal now has to decide in accordance with Rule 22(1)(f) of the General Medical Council (GMC) (Fitness to Practise) Rules 2004, as amended ('the Rules') whether Dr Herbst's fitness to practise is impaired by reason of misconduct.

The Outcome of Applications Made during the Impairment Stage

2. On 30 January 2025, the Tribunal granted an application made by Ms Curzon, Counsel on behalf of the GMC, pursuant to Rules 15 and 40 of the Rules and determined that notice of this hearing had been properly served on Dr Herbst. It also granted the GMC's application made pursuant to Rule 31 of the Rules to proceed with the case in Dr Herbst's absence. The Tribunal's full decision is included at Annex A.

3. Due to insufficient time remaining on 30 January 2025, the Tribunal determined to adjourn the hearing to a later date and extended the existing order of suspension for a period of two months until the hearing could reconvene. The Tribunal's full decision is included at Annex B.

4. This determination will be read in private. However, as this case concerns Dr Herbst's misconduct a redacted version will be published at the close of the hearing.

Background

5. Dr Herbst qualified in 1988. He worked as a Locum Consultant Anaesthetist at various sites in London and the surrounding area. At the time of the events, Dr Herbst was practising as a consultant anaesthetist at South West London Elective Orthopaedic Centre at Epsom General Hospital, Epsom and St Helier University Hospital NHS Trust ('the Hospital').

The January 2024 Tribunal

6. A Medical Practitioners Tribunal hearing took place between 3 to 12 January 2024 ('the January 2024 Tribunal').

7. The January 2024 Tribunal found that, on 27 September 2022, Dr Herbst attended work when he was unfit to do so. It found that Dr Herbst had been asleep whilst in charge of an anaesthetised patient in an operating theatre at the Hospital and could not be easily roused. It also found that, during the incident, he had been speaking incoherently and had been unsteady on his feet. The January 2024 Tribunal found that, at the time of the incident, Dr Herbst had been subject to a warning for similar conduct.

8. The January 2024 Tribunal went on to consider the matter of impairment in relation to Dr Herbst's misconduct. It noted that Dr Herbst had fallen asleep whilst in theatre and potentially put a patient at risk, but that no harm had come to them, because a colleague had taken over their anaesthetic care.

9. The January 2024 Tribunal had also determined that, after Dr Herbst woke up, he was speaking incoherently, unsteady on his feet and was unable to complete his sentences. The January 2024 Tribunal concluded that his poor responses were out of character and posed a potential further risk to patients had he continued with the theatre list.

10. The January 2024 Tribunal took into account Dr Herbst's evidence and was concerned about the varying accounts given. It could not determine what had caused the behaviour. The January 2024 Tribunal noted that Dr Herbst was subject to an earlier warning for similar conduct. It determined that the behaviour in 2022 was more serious, in light of the previous incident.

11. The January 2024 Tribunal considered that falling asleep during a procedure upon a patient under anaesthesia was a serious matter and Dr Herbst's actions amounted to serious professional misconduct.

12. When considering sanction, the January 2024 Tribunal was concerned that Dr Herbst had not formally acknowledged that he was at fault, nor the seriousness of his actions, but accepted he should not have attended work. The January 2024 Tribunal noted that Dr Herbst had not provided any objective evidence of any steps he might take to remediate his misconduct. The January 2024 Tribunal determined that there was a risk of repetition.

13. The January 2024 Tribunal took into account Dr Herbst's evidence and submissions. He told the Tribunal that in the future, if he was feeling unwell, he would not go to work and would call in to cancel his shift, he would not undertake any night shifts, and would reduce his weekly hours to around thirty. The 2024 Tribunal determined that going to work when he was unfit to do so was irresponsible, but not deliberate.

14. The January 2024 Tribunal noted that there was limited evidence before it as to what steps Dr Herbst had taken to remediate his misconduct or to develop insight into his actions. The January 2024 Tribunal determined that Dr Herbst's fitness to practise was impaired by reason of his misconduct.

15. The January 2024 Tribunal determined that the proportionate sanction was a period of suspension for six months. It considered that this was the minimum period necessary to allow Dr Herbst to continue addressing his insight and remediation. It also directed a review to allow Dr Herbst to demonstrate how he had reflected on his actions, developed insight and taken steps to remediate.

The July 2024 Tribunal

16. Dr Herbst's case was reviewed at a Medical Practitioners Tribunal hearing which took place on 25 July 2024 ('the July 2024 Tribunal'). Dr Herbst attended the hearing and made submissions on his own behalf.

17. The July 2024 Tribunal took into consideration a letter submitted by Dr Herbst, containing some reflections on his actions. It also took into account the limited insight, remorse and remediation by Dr Herbst as found by the January 2024 Tribunal. The July 2024

Tribunal considered this position had not changed significantly since the previous hearing. It was of the view that Dr Herbst had not offered or demonstrated any meaningful apology or shown anything other than superficial remorse into his misconduct. It noted that Dr Herbst had attempted to deflect his misconduct and sought to blame the GMC for their '*punitive approach*'.

18. The July 2024 Tribunal considered that Dr Herbst had demonstrated a superficial level of insight into the risk to patients of his actions. His reflections were not based upon ensuring there was no future risk of falling asleep, not being easily roused, being incoherent and unsteady on his feet as was found by the January 2024 Tribunal. The July 2024 Tribunal considered that Dr Herbst had not engaged with the findings, focusing instead on determining not to go to work if tired. It considered his reflections to be inadequate, and that Dr Herbst had adopted a casual approach to matters of insight, remorse and remediation.

19. The July 2024 Tribunal was of the view that Dr Herbst had not properly addressed the matters that the January 2024 Tribunal had set out. The July 2024 Tribunal considered that Dr Herbst had focused more upon his treatment by the GMC, and the conditions, as he saw them, in the NHS, than on any meaningful reflection or remediation upon how he might ensure there was no repeat of his misconduct. There was therefore little evidence upon which the July 2024 Tribunal could rely which indicated that Dr Herbst was safe to return to unrestricted practice.

20. In relation to keeping skills and knowledge up to date, the July 2024 Tribunal considered that there was inadequate evidence provided to objectively demonstrate that Dr Herbst had undertaken the Continual Professional Development ('CPD') training he had listed, nor when it was completed.

21. The July 2024 Tribunal also noted that Dr Herbst had not provided any evidence or reflection upon whether or not there are any underlying health issues which might have contributed to the misconduct.

22. In all the circumstances, the July 2024 Tribunal determined that Dr Herbst's fitness to practise remained impaired on all three limbs of the overarching objective.

23. In reaching its decision on sanction, the July 2024 Tribunal had regard to its decision on impairment, that Dr Herbst had shown only very limited insight, no meaningful

engagement with the regulatory process and had not remediated. Given that Dr Herbst had presented little further evidence, the July 2024 Tribunal found itself in a similar position to that of the January 2024 Tribunal. The Tribunal determined that, despite being suspended for six months, Dr Herbst had failed to develop his insight into his misconduct any further, which increases the risk of repetition which, in turn, presents a risk to patient safety.

24. The July 2024 Tribunal was of the view that Dr Herbst had demonstrated a casual attitude to the regulatory process. It was concerned by some of the comments made by Dr Herbst in his submissions, such as *'having the GMC attached to you is worse than the bubonic plague'* and *'the GMC has a vendetta against him'*. The July 2024 Tribunal considered that Dr Herbst had demonstrated that he been unable to accept the findings of the January 2024 Tribunal and told it that it was wrong. The July 2024 Tribunal concluded that such comments reinforced the finding that Dr Herbst had demonstrated very limited insight into his misconduct.

25. The July 2024 Tribunal considered that a further period of suspension would allow Dr Herbst a further opportunity to demonstrate that he has reflected on the impact of his actions on patient safety and public confidence, and to demonstrate insight in a meaningful way. The July 2024 Tribunal considered that it would also provide him with the necessary time to gather evidence of remediation, and to enable him to demonstrate that his clinical knowledge and skills have been kept up to date during the period of suspension.

26. The July 2024 Tribunal therefore determined to suspend Dr Herbst's registration for a period of six months and directed a further review. It noted that it may assist the reviewing Tribunal if Dr Herbst provided:

- evidence that he demonstrates the development of insight and reflections on the impact of his actions;
- evidence that Dr Herbst has made efforts throughout the period of his suspension to keep his clinical knowledge and skills up to date; and
- any other information that he considers will assist a review hearing, including evidence of strategies developed to prevent the misconduct from recurring.

Today's review hearing

27. At this review hearing the Tribunal now has to decide in accordance with Rule 22(1)(f) of the Rules whether Dr Herbst's fitness to practise remains impaired by reason of his misconduct.

The Evidence

28. The Tribunal received documentary evidence which included but was not limited to:
- MPTS Record of Determinations, dated 3 to 12 January 2024;
 - MPTS Record of Determinations, dated 25 July 2024; and
 - Dr Herbst's CPD records, dated September to October 2024.
29. Dr Herbst provided his own letter/witness statement, dated 24 October 2024 and also gave oral evidence at the hearing.

Submissions

30. On behalf of the GMC, Mr Potts submitted that Dr Herbst's fitness to practise remained impaired by reason of misconduct. He submitted that Dr Herbst's engagement with the findings of the January 2024 Tribunal and the July 2024 Tribunal have been limited and superficial. He directed the Tribunal to the statement submitted by Dr Herbst and the associated CPD evidence, and submitted that Dr Herbst continues to demonstrate limited insight into the potential impact of his misconduct on patient safety in a meaningful way.

31. Mr Potts submitted that an important aggravating feature of this case was that this was the second time that Dr Herbst had been found to be asleep whilst in an operating theatre and in charge of anaesthetised patient. He submitted that, without sufficient insight into the risk of patient safety, there is a real risk of repetition. Further, he submitted that Dr Herbst told the Tribunal in evidence that he did not agree with the warning that was put in place for the first incident but simply did not contest the issue because of the time and expense that it would have taken. Mr Potts submitted that this showed really limited insight into the seriousness of a repeated course of misconduct on two different occasions, which Dr Herbst has not addressed in any kind of meaningful way

32. Mr Potts stated that Dr Herbst has provided an apology, but his account of events and his responses in his oral evidence minimise the seriousness of his actions. He submitted that there is minimal reflection on the facts found proven by the January 2024 Tribunal, which only really goes to the circumstances leading to the incident, that Dr Herbst was XXX. He submitted that Dr Herbst has told the Tribunal that he will not in future go to work if he is tired or even slightly unwell. However, Dr Herbst conceded in his oral evidence that what he

had told his responsible officer soon after the incident was correct, that the night before the incident in September 2022, he had been up late preparing his tax return. Mr Potts submitted that Dr Herbst has not demonstrated that he has reflected in any meaningful way about how that might have contributed to his misconduct, or to demonstrated that this would not be repeated in the future.

33. Mr Potts submitted that the list of CPD which has been provided includes a number of items that are not particularly relevant to the case and are simply routine or mandatory, and no issue is taken with that. However, Mr Potts submitted that, significantly, there is nothing in Dr Herbst's CPD which might address, for example, the effect of a demanding workload. Mr Potts submitted that Dr Herbst had outlined in his evidence that been working as a locum for 30 years, doing long shifts with heavy work loads, often at short notice. He submitted that Dr Herbst has not addressed the effect this may have on his practice, nor has he demonstrated how he might avoid these issues in the future. He submitted that remediation in that regard is effectively absent, and Dr Herbst continues to focus on not attending work unwell or tired, but has provided no details as to how he will try and put in place strategies or measures to amend his working routine.

34. Mr Potts submitted that it was notable that Dr Herbst has not provided any reflection or addressed the extent to which his actions could impact and undermine public confidence in the profession. He submitted that the superficial approach taken by Dr Herbst in outlining his attitude and insight shows that he has not addressed the impact of his actions on public confidence in the profession. He submitted that all of the CPD undertaken was completed in a relatively short period of time, which Dr Herbst explained as him being out of the country and unable to access resources to undertake any more extensive work. Further, he submitted that Dr Herbst has not looked into any courses which are aimed at reskilling or returning to practise after some time away, although it was accepted that these courses are only recent in their introduction. He submitted that there was a question in whether Dr Herbst was ready to return to practise immediately.

35. Mr Potts submitted that there remained a lack of insight in this case, and without work to address the identified issues, or public confidence in the profession, there was a real risk of repetition, which in turn presents a risk to patient safety. Further, he stated that Dr Herbst does not appreciate the gravity of his misconduct and has not taken sufficient meaningful steps to remediate. For all of those reasons, he submitted that Dr Herbst's fitness to practise remains impaired.

36. Dr Herbst submitted that he had worked for 35 years without ever causing the slightest harm to a patient. He stated that the NHS currently has millions of people on a waiting list, and that whilst his return to work would not resolve all of those waiting lists, it would certainly resolve a few thousand people who are currently waiting for operations.

37. Dr Herbst stated that he had realised his mistake of going to work when he was feeling unwell, which he would not repeat. He submitted that the Tribunal's choice now is to either let him carry on working for a few more years, or he could retire tomorrow, which would not be good for the NHS or the taxpayer.

38. Dr Herbst submitted that he strongly disagreed with the submissions of the GMC, as he had learned his lesson, and would be more careful about going to work when ill. He submitted that he would appreciate the opportunity to go back to work and to be useful for a few more years.

The Relevant Legal Principles

39. The Tribunal reminded itself that the decision of impairment is a matter for the Tribunal's judgement alone. As noted above, the previous Tribunal set out the matters that a future Tribunal may be assisted by. This Tribunal is aware that it is for Dr Herbst to satisfy it that he would be safe to return to unrestricted practise.

40. This Tribunal must determine whether Dr Herbst's fitness to practise is impaired today, taking into account his conduct at the time of the events and any relevant factors since then such as whether the matters are remediable, have been remedied and any likelihood of repetition.

The Tribunal's Determination on Impairment

41. The Tribunal first considered the determinations of the previous Tribunals, including what the July 2024 Tribunal set out to assist a future Tribunal at a review hearing. The Tribunal considered whether Dr Herbst had demonstrated that he had gained sufficient insight into his actions.

42. In considering the issue of insight, the Tribunal considered that there was limited evidence before it to suggest that Dr Herbst had developed any additional insight into his misconduct, over and above that which was communicated to the July 2024 Tribunal. The Tribunal was of the view that Dr Herbst has been unable to accept the findings of the January 2024 Tribunal and that this may have framed how he views these proceedings, and in particular his view that he is being punished for being XXX on the day of the incident. The Tribunal acknowledged that it is not a requirement that Dr Herbst agrees with the January 2024 Tribunal's findings in order for him to establish that he has developed insight.

43. The Tribunal found there was a gap in Dr Herbst's insight because he continued to minimise the seriousness of his actions or recognise the risks that falling asleep whilst in charge of an anaesthetised patient could have posed. Further, it noted that he continues to place blame on others, as he suggested in his oral evidence that his assistant should have tapped him on the shoulder, or offered him coffee, if they were concerned that he was tired. Dr Herbst did not agree that he was difficult to rouse or that he was speaking incoherently, as outlined in his substantive hearing. The Tribunal accepted that, if Dr Herbst was unwell on the day in question, this could well have contributed to his tiredness. However, it noted that, while Dr Herbst maintains that his falling asleep was the result of being unwell, he also continues to make the case that he could have been easily roused and assisted with a cup of coffee, and he does not know why his assistant did not do this. The Tribunal considered that Dr Herbst continues, to an extent, to seek to minimise the events in question or attribute culpability to others.

44. In those circumstances, notwithstanding Dr Herbst's oral and written evidence that he understands the seriousness of the events in question and that he would not repeat them, the Tribunal could not be satisfied that Dr Herbst has developed sufficient insight into his actions which would adequately mitigate the risk of repetition. Further, the Tribunal considered that Dr Herbst provided very limited evidence of his understanding of the potential implications of falling asleep during an operation for individual patients or public confidence in the profession. Until further insight has developed, and remediation has been demonstrated, the Tribunal was of the view that there remains a risk of repetition, albeit that it accepted that Dr Herbst is on a path to developing insight into the seriousness of his misconduct.

45. The Tribunal also took into consideration the length of time that has passed since Dr Herbst last practised. It noted that there was limited evidence before it to demonstrate that

Dr Herbst had kept his knowledge and skills up to date, and it was concerned that it has now been in excess of two years since Dr Herbst has practised medicine. The Tribunal noted that the only evidence Dr Herbst has presented of his CPD since the last hearing, covers a six-week period between September and October 2024, and seemed to cover basic areas of practise which are mandatory for all doctors to complete. Although Dr Herbst gave evidence that he has continued to read medical literature since he last practised, there was no evidence of any specific courses designed to target the issues in this case, such as addressing work life balance, and overworking, nor any specific training for anaesthesiology.

46. When asked by the Tribunal whether he was aware of newly developed programmes designed to support doctors returning to work, specifically in his area of practice, Dr Herbst informed the Tribunal that, although he would be willing to, he did not think he needed to attend such a course. The Tribunal was concerned that Dr Herbst appeared not to recognise that by the passage of time and the fact that he has been working in agriculture since ceasing clinical practice, more would likely be required in terms of maintaining knowledge and skills, than has been evidenced. The Tribunal acknowledged that Dr Herbst has been living in Colombia and has not had access to the courses or training that he would have in the UK, however it considered that this is an issue which requires focussed reflection by Dr Herbst, prior to a return to unrestricted practice. The Tribunal accepted that a practitioner with Dr Herbst's considerable experience, could, in a relatively short period of time, reskill himself to the necessary standard, but it considered that that he would need the appropriate support to achieve that level and further evidence of learning and CPD etc would be required.

47. In considering whether Dr Herbst's fitness to practise is currently impaired, the Tribunal balanced his ongoing lack of insight and the assessed risk of repetition against the overarching objective. The Tribunal were mindful that there is an onus on Dr Herbst at a review hearing to demonstrate that he has sufficiently addressed the concerns in the case, which it considered he had not yet done.

48. Taking all of the above into account, the Tribunal has therefore determined that Dr Herbst's fitness to practise remains impaired by reason of misconduct.

Determination on Sanction - 21/03/2025

1. Having determined that Dr Herbst's fitness to practise remains impaired by reason of his previous misconduct, the Tribunal now has to decide in accordance with rule 22(1)(h) of the Rules what action, if any, it should take with regard to his registration.

2. The Tribunal was satisfied that its finding of impairment was required to meet the needs of all three limbs of the overarching objective. In light of its conclusions regarding Dr Herbst's insight, remediation, and the risk of repetition, together with the limited evidence presented of Dr Herbst keeping his clinical knowledge and skills up to date, the Tribunal considered that such a finding was required to protect, promote and maintain the health, safety and well-being of the public; and that public confidence in the profession would be undermined and proper standards and conduct for members of the profession would not be maintained, if a finding of impairment were not made.

Submissions

3. On behalf of the GMC, Mr Potts relied on a number of relevant paragraphs of the Sanctions Guidance (2024) ('the SG') and submitted that the appropriate sanction in this case is a further period of suspension.

4. Mr Potts submitted that there are no exceptional circumstances in this case which would justify the Tribunal taking no action. Further, he submitted that an order of conditions would not be appropriate because there is an inherent difficulty in finding appropriate and workable conditions in the context of Dr Herbst's case. Mr Potts submitted that only Dr Herbst will know on any given day whether he is fit to work in a safe manner, or whether his schedule and sleep patterns or anything else going on may have interfered with that. Further, he submitted that Dr Herbst's continuing lack of insight beyond a superficial level is crucial to determining the appropriate sanction.

5. Mr Potts submitted that the Tribunal needs to consider the aggravating and mitigating factors in this case. With regard to mitigation, he reminded the Tribunal that Dr Herbst has made reference to having been XXX at the time of the incident and feeling that he being punished for this, but he submitted that Dr Herbst's argument in this regard is limited in terms of impact, as there were other factors present which may have contributed to his

sleepiness on that day, such as his staying up late the night before to complete his tax returns. He acknowledged that Dr Herbst has apologised for his actions and expressed remorse.

6. With regard to aggravating factors, Mr Potts submitted that Dr Herbst currently lacks full insight and continues to minimise the seriousness of his misconduct. He accepted that Dr Herbst's insight is evolving but stated that there is still work to be done, particularly in relation to gaining insight into the risks to patient safety and in the impact of his misconduct on public confidence in the profession. Mr Potts submitted that things have not moved forward significantly since the previous Tribunal and, as such, suspension remains the appropriate sanction at this stage.

7. Mr Potts submitted that erasure is not appropriate at this stage. He submitted that, due to Dr Herbst's limited insight and remediation, action must be taken to protect the public, given the risk to patient safety in this case in light of Dr Herbst's time away from clinical practice. Further, he submitted that a further suspension would maintain public confidence in the profession.

8. On receiving the Tribunal's determination on impairment, Dr Herbst initially submitted that he intended to retire from medicine at this stage if he is not able to practise without restriction. He submitted that he would like to continue practising medicine, because he is good at it, and has worked as a doctor for more than 30 years without mishap. Dr Herbst submitted that he recognises he should not have gone to work while he was ill, but he did not make the choice with bad intentions. He stated that he regretted the choice he had made.

9. Dr Herbst stated that he would like to be allowed to return to practise without restriction. He submitted that it would be very difficult for him to find hospitals or Trusts willing to employ him if he were subject to conditions.

The Relevant Legal Principles

10. The Tribunal is aware that the decision as to the appropriate sanction, if any, to impose on Dr Herbst's registration is a matter for it alone, exercising its independent judgement. In reaching its decision, the Tribunal has taken account of the SG. The Tribunal

has also taken into account its decision on impairment, the submissions of Mr Potts and Dr Herbst, and the documentary evidence adduced during this review hearing.

11. The Tribunal recognised that the purpose of a sanction is not to be punitive, although it may have a punitive effect. The Tribunal must impose a sanction only if it is required in order to protect patients, maintain public confidence in the profession, and/or meet the wider public interest. Throughout its deliberations, the Tribunal applied the principle of proportionality, balancing Dr Herbst's interests with the public interest.

The Tribunal's Determination

12. The Tribunal first identified what it considered to be the mitigating and aggravating factors in this case and reminded itself of its conclusions and findings on impairment.

13. The Tribunal considered Dr Herbst's ongoing lack of full insight to be an aggravating factor. It noted that, since the last hearing, very little appears to have changed with regard to Dr Herbst's development of insight, and the Tribunal was concerned that, when asked whether he had read the full detail of the original Tribunal's determination, or the July 2024 Tribunal's determination, Dr Herbst indicated that he had not. The Tribunal was concerned that Dr Herbst's failure to read the determinations in his case in detail may, of itself, be indicative of a lack of meaningful engagement with the regulatory process, and it may indicate a further gap in his insight and steps taken to remediate.

14. That said, the Tribunal did acknowledge that Dr Herbst has now attended at three hearings, which is indicative of continuing general engagement, and the Tribunal also acknowledged that Dr Herbst has apologised for his actions and has provided some evidence of evolving insight.

15. However, the Tribunal was also concerned that, if Dr Herbst has not fully read the determinations to date, he is unlikely to be able to fully understand or appreciate the findings which have been made or indeed the issues he is required to address if he wishes to return to clinical practise. The Tribunal was concerned that Dr Herbst is disadvantaging himself by not fully engaging with the determinations in his case and, until he does so, it will continue to be very difficult for him to fully develop his insight and take (and provide evidence of) appropriate remedial steps. It will also continue to be difficult for Dr Herbst to provide

evidence of reflecting on matters to include, for example, the potential risk of harm to patients of his actions or the impact on public confidence in the profession.

16. In deciding what sanction, if any, to direct, the Tribunal reminded itself that it must consider each of the sanctions available, starting with the least restrictive, to establish which is most appropriate and proportionate.

No action

17. The Tribunal first considered whether to conclude the case by taking no action. It considered that there were no exceptional circumstances in Dr Herbst's case which would justify it taking no action.

Conditions

18. The Tribunal next considered whether it would be sufficient to impose conditions on Dr Herbst's registration. The Tribunal took into account the fact that Dr Herbst has not practised for a relatively significant period of time at this stage and he has submitted limited evidence to demonstrate that he has maintained his clinical skills during his time away from clinical practice.

19. The Tribunal noted that conditions may be workable where a doctor has insight into their misconduct, is likely to comply with conditions, and where a doctor is likely to respond positively to remediation or retraining. The Tribunal considered that these factors do not currently apply in Dr Herbst's case. It was of the view that Dr Herbst is currently unwilling to be subject to restriction and likely would not respond positively to such measures at this time.

20. Taking these matters into account, the Tribunal concluded that conditions would not be sufficient or appropriate to protect, promote and maintain the health, safety and well-being of the public, to maintain public confidence in the profession or to promote and maintain standards for members of the profession.

Suspension

21. In considering whether to impose a period of suspension on Dr Herbst's registration, the Tribunal had regard to paragraphs 91, 93, and 97(a), (e), (f) and (g) of the SG which provide:

'91 *Suspension has a deterrent effect and can be used to send out a signal to the doctor, the profession and public about what is regarded as behaviour unbefitting a registered doctor. Suspension from the medical register also has a punitive effect, in that it prevents the doctor from practising (and therefore from earning a living as a doctor) during the suspension, although this is not its intention.*

...

93 *Suspension may be appropriate, for example, where there may have been acknowledgement of fault and where the tribunal is satisfied that the behaviour or incident is unlikely to be repeated. The tribunal may wish to see evidence that the doctor has taken steps to mitigate their actions (see paragraphs 24–49)*

...

97 *Some or all of the following factors being present (this list is not exhaustive) would indicate suspension may be appropriate.*

a A serious departure from Good medical practice, but where the misconduct is not so difficult to remediate that complete removal from the register is in the public interest. However, the departure is serious enough that a sanction lower than a suspension would not be sufficient to protect the public.

...

e No evidence that demonstrates remediation is unlikely to be successful, eg because of previous unsuccessful attempts or a doctor's unwillingness to engage.

f No evidence of repetition of similar behaviour since incident.

g The tribunal is satisfied the doctor has insight and does not pose a significant risk of repeating behaviour'

22. The Tribunal had regard to its assessment of Dr Herbst's insight and the associated risk of repetition. It was of the view that Dr Herbst, with a further opportunity to address his misconduct and reflect on his actions, would be able to develop his insight to a sufficient level that he would be in a position to return to the medical profession and make a positive contribution.

23. Given the length of time Dr Herbst has now been out of clinical work, the Tribunal considered that it is necessary for him to demonstrate that he has kept his knowledge and skills up to date. It noted Dr Herbst's evidence that he had been reading medical texts during his suspension but was not satisfied that this adequately demonstrated that he was up to date, particularly in terms of his clinical skills. The Tribunal considered that there are courses and programmes available to Dr Herbst to help facilitate re-skilling with a view to returning to clinical work. It was of the view that the onus was on Dr Herbst to identify programmes that would be suitable and appropriate for his area of practise, and to provide evidence of keeping his skills and knowledge up to date.

24. In light of the above, the Tribunal determined that a further period of suspension would be the appropriate and proportionate sanction when considering Dr Herbst's interests alongside the public interest. The Tribunal took into account the impact that this sanction may have upon Dr Herbst. However, in all the circumstances the Tribunal concluded that his interests are outweighed by the need to protect, promote and maintain the health, safety and well-being of the public, to maintain public confidence in the profession and to declare and uphold proper standards of conduct and behaviour.

25. In determining the length of the suspension, the Tribunal had regard to paragraphs 99 to 102 of SG and the table following paragraph 102. The Tribunal was of the view that Dr Herbst needs sufficient further time to fully engage with the regulatory process, to read the decisions of this Tribunal and the past Tribunals, and to reflect on the concerns raised. It considered that these steps are necessary in order for Dr Herbst to move forward, develop his insight and fully remediate. The Tribunal also considered that there is a need to provide evidence of keeping his clinical skills and knowledge up to date, and sufficient time is required to permit Dr Herbst to identify and attend appropriate courses or CPD etc.

26. Taking these matters into account, the Tribunal was satisfied that a further period of six months' suspension was appropriate and proportionate to meet the needs of the overarching objective and is in Dr Herbst's own interests in order that he has sufficient time in which to gather the necessary evidence, to develop his insight, and to further remediate.

27. The Tribunal did not consider that Dr Herbst's misconduct is fundamentally incompatible with continued registration and erasure would, therefore, not be appropriate or proportionate, or in the public interest.

28. The Tribunal determined to direct a review of Dr Herbst's case. A review hearing will convene shortly before the end of the period of suspension. The Tribunal wishes to clarify that at the review hearing, the onus will be on Dr Herbst to demonstrate how he has developed insight. It therefore may assist the reviewing Tribunal if Dr Herbst provides:

- Further evidence that Dr Herbst has reflected on his misconduct and has developed insight;
- Further evidence that Dr Herbst has kept his clinical knowledge and skills up to date during the period of his suspension;
- A return to work plan, identifying any gaps in his knowledge as a result of his gap in clinical practice, and identifying steps to address such gaps; and
- Any other information that he considers will assist a review hearing.

29. The Tribunal has determined to suspend Dr Herbst's registration for six months. The MPTS will send Dr Herbst a letter informing him of his right of appeal and when the direction and the new sanction will come into effect. The current order of suspension will remain in place during the appeal period.

30. That concludes this case.

ANNEX A – 12/03/2025

Service and Proceeding in Absence

1. Dr Herbst was neither present nor legally represented on day one of this hearing.
2. Dr Herbst had indicated to the GMC and MPTS that he would be attending the hearing, commencing at 9:00am on 30 January 2025. Due to minor technical issues, the hearing start time was delayed until 9:15am. Dr Herbst did not join the hearing link at the expected start time. A member of MPTS staff attempted to contact Dr Herbst by telephone and email but received no response.
3. Given Dr Herbst's indicated attendance, the Tribunal agreed to delay the hearing to start at 10:00am to allow Dr Herbst time to contact the MPTS or join the hearing link. Two further emails were sent to Dr Herbst, setting out that the Tribunal would delay, but would proceed at 10:00am. The MPTS also attempted two further telephone calls. No response was received.
4. The Tribunal commenced the hearing at 10:00am, and invited submissions from the GMC as to whether the hearing should proceed in the absence of Dr Herbst. The Tribunal noted that in order to proceed with the hearing in Dr Herbst's absence, it needed to be satisfied that Dr Herbst had been properly served with notice of the hearing and that it was appropriate for the hearing to proceed in his absence.
5. The Tribunal was provided with a copy of a Service Bundle from the GMC. The Service Bundle indicates that, on 3 January 2025, a letter was delivered to Dr Herbst at his registered address, stating that his case was due to be reviewed on 30 January 2025 and enclosing a copy of the hearing bundle.

GMC's Submissions

6. On behalf of the GMC, Ms Curzon took the Tribunal through the service bundle and highlighted that the Notice of Hearing had been sent to Dr Herbst by post to his registered address. She submitted that Dr Herbst had contacted the GMC by telephone on the same day to indicate that he would be attending the hearing. She invited the Tribunal to conclude that

service had been effected in accordance with the GMC (Fitness to Practise) Rules 2004, as amended ('the Rules').

7. Ms Curzon submitted that the discretion to proceed in the absence of a doctor by the Tribunal should be exercised with appropriate care and caution. Balancing the interests of Dr Herbst with the wider public interest, she submitted that Dr Herbst's absence today is voluntary and no application for adjournment has been made. Ms Curzon submitted that no contact has been received from Dr Herbst to explain his absence. She submitted that, in all the circumstances, it is very reasonable and fair to proceed with Dr Herbst's absence in accordance with Rule 31 of the Rules.

Tribunal's Determination

Service

8. The Tribunal had regard to Rule 40(2) of the Rules which provides that a notice or document required to be served under the Rules may be served by ordinary post, or by electronic mail to an electronic mail address, that the practitioner had notified to the Registrar as an address for communications.

9. In light of the evidence showing the Notice of Allegation and other letters being served by post to Dr Herbst, and his response to those letters, the Tribunal was satisfied that he had been properly served with the Notice of Hearing in accordance with Rules 15 and 40 of the Rules.

Proceeding in Dr Herbst's Absence

10. In making its determination the Tribunal noted that the decision as to whether or not the hearing should proceed in Dr Herbst's absence was a matter for its discretion and that such discretion was to be exercised with care and caution.

11. The Tribunal noted that the letters sent to Dr Herbst informed him of the date of the hearing, his right to attend it, and to be legally represented. He was also informed that the hearing could proceed in his absence if he did not attend.

12. The Tribunal noted that Dr Herbst had responded to correspondence sent to him and stated that he would be attending the hearing. It noted that additional efforts were made by MPTS staff to contact Dr Herbst after he failed to join the hearing at 9:15am. The Tribunal took into account that there could have been a significant event which affected his ability to attend, however no contact has been received to explain his non-attendance.

13. The Tribunal concluded, in light of the information before it, that Dr Herbst had voluntarily absented himself from this hearing.

14. The Tribunal considered whether an adjournment would result in Dr Herbst attending the hearing. Setting aside that there had been no application for an adjournment, there was no evidence before the Tribunal that an adjournment would result in Dr Herbst attending.

15. The Tribunal also considered whether any decision to proceed in Dr Herbst's absence may result in disadvantage or prejudice to him taking account of the fact that it may not necessarily have all of the information which he would wish to present. However, the Tribunal considered that any such prejudice must be balanced against other factors including the statutory overarching objective and the public interest. The Tribunal noted that the public interest included the need for a fair, economic, expeditious and efficient disposal of the hearing. These matters should be balanced against any prejudice to Dr Herbst.

16. The Tribunal noted that part of its role was to ensure a fair hearing notwithstanding Dr Herbst's absence. The Tribunal observed that all reasonable efforts had been made to inform Dr Herbst of today's hearing and to make contact when he failed to attend. The Tribunal also noted that there was a duty to review his substantive order of suspension before the expiry of that order on 13 February 2025. The Tribunal balanced these facts against the statutory overarching objective, the fair, economic, expeditious and efficient disposal of the proceedings and the public interest.

17. Having considered each of the relevant factors, the Tribunal determined that it is fair, just, and in both the public and Dr Herbst's interest to proceed with the hearing in his absence.

ANNEX B – 30/01/2025

Adjournment and application to extend the current order of suspension under Rule 22(5)(a) and section 35D(5)(a) of the Medical Act 1983

1. Dr Herbst is currently subject to an order of suspension which is due to expire on 13 February 2025. This review hearing was due to commence at 09:00am on 30 January 2025 but due to minor technical issues, the hearing start time was delayed until 9:15am. Dr Herbst had previously indicated his intention to participate in the hearing but did not join the hearing link at the expected start time. A member of MPTS staff attempted to contact Dr Herbst by telephone and email but received no response.
2. Given Dr Herbst's indicated attendance, the Tribunal agreed to delay the hearing to start at 10:00am. The MPTS attempted on several occasions to contact Dr Herbst but received no response.
3. The hearing commenced shortly after 10:00am, and the Tribunal accepted that service of the Notice of Hearing had been effected in accordance with the Rules, and granted an application to proceed in Dr Herbst's absence. The Tribunal received submissions from Ms Curzon on behalf of the GMC and went into Camera shortly after 11:30am to discuss current impairment.
4. Shortly after the Tribunal went into Camera, the MPTS Staff were made aware that Dr Herbst was attempting to contact them regarding his hearing, and a member of staff spoke to him on the telephone. Dr Herbst told the MPTS Staff that he was presently '*in a warzone*' and that he had some communication issues. He asked for a short period of time to make some enquiries with a family member about emails he had been sent, at which time the Tribunal was made aware of his contact, before it could commence any deliberations. The Tribunal agreed to give a short period of time to allow Dr Herbst to make further contact.
5. Dr Herbst did not contact the MPTS again and did not answer the telephone when a further attempt was made to contact him.
6. After consideration of the remaining time available, the Tribunal raised with Ms Curzon whether it would be appropriate adjourn the hearing to a future date before deliberating on the issue of current impairment, or whether the GMC considered that it

should reach a decision on impairment and then, if needed, adjourn to a future date to consider any sanction.

Submissions

7. On behalf of the GMC, Ms Curzon submitted that in the circumstances it would not be appropriate to adjourn. She submitted that Dr Herbst has stated that he is in some sort of war zone, but has not indicated where that is specifically, or whether he would be in a position to join the hearing today or on any other date. She stated that this is the first time that the GMC been made aware that he was out of the country. Furthermore, she stated that Dr Herbst was aware of the hearing and had indicated his intention to attend, but had waited until close to 12:00pm to make contact with the MPTS.

8. Ms Curzon submitted that the evidence Dr Herbst has provided in advance of today's hearing, which has been addressed, will be the same evidence that would be available at the next hearing. She stated that Dr Herbst has been aware of the upcoming review hearing since October 2024, and has had time to provide evidence to the Tribunal for this hearing. She submitted that it was unlikely that there would be a material difference to Dr Herbst's position other than perhaps his attendance.

9. Ms Curzon submitted that there is no independent evidence to support Dr Herbst's position, which has not been raised before. She submitted that he has had time to raise the issue with the GMC. She submitted that in those circumstances, it would not be appropriate to adjourn prior to reaching a decision on current impairment.

10. Ms Curzon submitted that, should the hearing adjourn before its conclusion, then the Tribunal should extend the existing order of suspension, so that the order does not lapse before it is possible for the Tribunal to reconvene.

The Tribunal's Decision

11. The Tribunal took account of Rule 22(5)(a) of the Rules, which provides:

'(5) Where, prior to the Medical Practitioners Tribunal making a finding under rule 22(1)(f), a review hearing is adjourned under rule 29(2), the Medical Practitioners Tribunal—

(a) must consider whether to make a direction under section 35D(5)(a), (8)(a), or (12)(c) of the Act and announce its decision in that regard; and

(b) may consider whether to make an order under section 41A of the Act and announce its decision in that regard.'

12. The Tribunal also took account of section 35D(5)(a) of the Medical Act 1983:

'35D

(5) On a review arranged under subsection (4A) or (4B), a Medical Practitioners Tribunal may, if they think fit—

(a) direct that the current period of suspension shall be extended for such further period from the time when it would otherwise expire as may be specified in the direction;'

13. Given the lateness of the day, the Tribunal was of the view that an adjournment was unfortunately inevitable. It therefore considered whether it was appropriate to adjourn prior to commencing deliberations on impairment.

14. The Tribunal noted that Dr Herbst had previously indicated that he would attend the hearing today, and had attended both the January 2024 Tribunal and the July 2024 Tribunal. It also noted that he had attempted to make contact with the MPTS, although not in the timeframe originally indicated at the commencement of the day, and not in any meaningful way, which had resulted in significant losses of time.

15. The Tribunal was of the view that there was no prejudice to the GMC if it were to adjourn before reaching a decision on impairment, given that it would now be adjourning in any event. Dr Herbst's current position is unknown and, taking into account his statement that he is currently '*in a warzone*' and that his communication has been limited, it determined that it would be appropriate to reserve its position to a future date as this would allow Dr Herbst time to re-engage with the MPTS and to attend the hearing. If Dr Herbst does not attend, then the Tribunal will continue to deliberate on impairment without his contribution. If Dr Herbst does attend, he may make an application to be permitted to give evidence and make submissions on impairment.

16. The Tribunal was informed that Dr Herbst's current sanction will expire on 13 February 2025.
17. The Tribunal took account of the need to uphold standards and to maintain public confidence in the medical profession. In that context, it was concerned that Dr Herbst's sanction should not be permitted to lapse before the Tribunal can complete its consideration of his case.
18. The Tribunal identified a re-listing date of 12 March 2025.
19. In those circumstances, the Tribunal concluded that a two-month extension of the current order of suspension is required to maintain public confidence in the profession. It decided to exercise its discretion under Rule 22(5)(a) and section 35D(5)(a) on the basis that the Tribunal thought it fit to extend the order of suspension, pending the resumption of this hearing.
20. Accordingly, the Tribunal determined to extend the order of suspension for two months.
21. This case now stands adjourned and the Tribunal shall re-convene on 12 March 2025 at 9am.

ANNEX C – 21/03/2025

Application to proceed in the doctor's absence on the last day of the hearing

1. On the final day of the hearing Dr Herbst telephoned the MPTS to let the Tribunal know that he could not attend the virtual hearing as he could not access the Microsoft Teams hearing link due to technical difficulties associated with living in a remote part of South America.
2. The Tribunal noted that the virtual hearing link had been issued to Dr Herbst's registered email address. Further, it acknowledged that the doctor had experienced further technical difficulties earlier in the hearing.

3. The Tribunal was mindful that the purpose of today's hearing was simply to hand down its determination on sanction.

Submissions on behalf of the GMC

4. Mr McCarthy stated that the GMC was content that Dr Herbst was aware of today's hearing as it had been discussed with the doctor on 12 March 2025 and stated that Dr Herbst had chosen not to attend. He stated that, as such, the GMC's position was that the hearing should proceed in the doctor's absence.

Tribunal decision

5. In its deliberations, the Tribunal had regard to the cases of *R v Jones*, *R v Haywood*, and *Adeogba v GMC*. The Tribunal was aware that it has a discretion to proceed with the case in the doctor's absence, though this discretion is to be exercised with caution with the overall fairness of the proceedings in mind. The Tribunal had regard to all the circumstances.

6. The Tribunal noted that it had previously determined that service of the Notice of Hearing had been effected.

7. Further, it was aware that Dr Herbst had attempted to join the hearing today and that he was aware of the hearing.

8. The Tribunal noted that it had the discretion to proceed in the doctor's absence.

9. The Tribunal considered whether it was appropriate to proceed in Dr Herbst's absence to hand down its determination on sanction and concluded that it is appropriate given that the doctor was clearly aware of the hearing and had been given the opportunity to join the hearing virtual hearing. The Tribunal also considered that there was no prejudice to Dr Herbst in proceeding in his absence given that the purpose of today's hearing is simply to hand down its determination on sanction. It considered that no useful purpose would be served by an adjournment or further delay today.