

PUBLIC RECORD

Date: 24/09/2025

Doctor: Dr Thomas HERBST

GMC reference number: 3270242

Primary medical qualification: State Exam Med 1988 Freie Universität Berlin

Type of case	Outcome on impairment
Review - Misconduct	Impaired

Summary of outcome
Erasure

Tribunal:

Legally Qualified Chair	Mr Nathan Moxon
Registrant Tribunal Member:	Dr Fatima Ali
Registrant Tribunal Member:	Dr Hazel Busby-Earle

Tribunal Clerk:	Ms Fiona Johnston
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Attendance and Representation:

Doctor:	Present, not represented
GMC Representative:	Ms Isobel Thomas, Counsel

Attendance of Press / Public

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

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 - 24/09/2025

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. 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

3. 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

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

5. 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 in 2020.

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

7. When considering sanction, the January 2024 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.

8. 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.

9. 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

10. 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.

11. 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 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*'.

12. 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. 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.

13. 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.

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

15. In all the circumstances, the July 2024 Tribunal determined that a finding that Dr Herbst's fitness to practise remained impaired was necessary to protect the public, to maintain standards of the profession and to promote proper professional standards.

16. In reaching its decision on sanction, 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.

17. 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 March 2025 Tribunal

18. Dr Herbst's case was reviewed at a Medical Practitioners Tribunal hearing which took place on 12 March 2025 ('the March 2025 Tribunal').

19. The March 2025 Tribunal considered that there was limited evidence before it to suggest that Dr Herbst had developed any additional insight into his misconduct. The Tribunal

was of the view that Dr Herbst had been unable to accept the findings of the January 2024 Tribunal.

20. The March 2025 Tribunal found Dr Herbst had not developed any insight, 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.

21. The March 2025 Tribunal found that there was limited evidence before it to demonstrate that Dr Herbst had kept his knowledge and skills up to date.

22. The March 2025 Tribunal was of the view that there remained a risk of repetition, albeit that it accepted that Dr Herbst was on a path to developing insight into the seriousness of his misconduct. Taking all the factors outlined, the March 2025 Tribunal determined that Dr Herbst's fitness to practise remained impaired by reason of misconduct.

23. In reaching its decision on sanction, the March 2025 Tribunal considered Dr Herbst's ongoing lack of full insight to be an aggravating factor. It noted that, since the last hearing little had changed with regard to Dr Herbst's development of insight. The March 2025 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 March 2025 Tribunal were concerned that Dr Herbst's failure to read the determinations in his case in detail may 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.

24. The March 2025 Tribunal had regard to 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.

25. The March 2025 Tribunal therefore determined to suspend Dr Herbst's registration for a period of six months and directed a further review.

26. The March 2025 Tribunal noted that it may assist the reviewing Tribunal if Dr Herbst provided:

- 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.

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

- Record of Determination of the MPT Hearing dated 3-12 January 2024;
- Record of Determination of the MPT Review Hearing dated 25 July 2024;
- Record of Determination of the MPT Review Hearing dated 30 January; 2025, 12 & 21 March 2025;
- Letter from the GMC to Dr Herbst- MPT info request dated 29 May 2025;

29. Dr Herbst provided a reflection letter dated 17 June 2025. He also gave oral evidence at the hearing.

30. Dr Herbst told the Tribunal he should have just cancelled the operating list but cancelling the operating list is unpleasant for all the patients who have been waiting for the operation for probably a year or so. He accepts that, in retrospect, he should not have done the operation and stayed at home.

31. Dr Herbst said it was the wrong decision, and he knows that he cannot go to work if he does not feel completely well.

32. Since he has been suspended, he has lived in Bolivia and does not have access to the internet so online learning is restricted. He said he has a suitcase full of medical books which he has read but has not been doing anything medical since. He completed about 80 CPD points last year, but he has not attended any courses this year as he cannot afford to do so.

33. Dr Herbst told the Tribunal that de-skilling is not an issue as anaesthetics has not changed a great deal in the last ten years. He said there has been no change in medication and techniques.

34. Dr Herbst said that he is extremely remorseful and sorry for having gone to work while he was feeling unwell and should have not done it. He asked the Tribunal to consider that there are 7 million people on the waiting list and that he is an experienced doctor who could do a few thousand more operations.

35. Dr Herbst when questioned from the GMC said he does not accept the previous Tribunal's determination that he was difficult to rouse from his sleep and that he was speaking incoherently. He said that he had assistant who was supposed to be there with him at all times and to wake him up, but they wandered off.

36. When questioned about the warning he received for similar conduct in 2020 from the GMC, he told the Tribunal he could not remember the incident and does not accept he had a warning.

37. Dr Herbst said that he has read the previous determinations but still has no recollection of the fact he received a warning.

38. Dr Herbst said he is getting old and only wants to work a few days a week after a good night's sleep. He does not want to travel far for work or undertake complicated operating lists. He said that it would still benefit the British public in the sense that they have got a lot of people waiting on their waiting lists.

39. He told the Tribunal he does not have any underlying XXX issues, he was just not feeling well on the day of the incident which gave rise to the finding of misconduct. He said he should have an assistant with him at all times and be fully conscious, as it can be potentially dangerous for the patient if he falls asleep. He said the patient is monitored at all times and alarms will go off if he falls asleep, so there is a layer of safety there. He said he has

read some articles about fatigue, which advised against drinking alcohol the night before work and against late nights.

40. Dr Herbst said that he has done more than enough CPD points to keep his knowledge up to date and the fact that he cannot do anything clinical in a hospital setting is the fault of the GMC. He said that he has a return-to-work plan in his head and that he will stick to simple operations in the future.

41. Dr Herbst said he is fit to return to practise. He is no longer XXX, he is in good physical shape, and he has his practical skills.

Submissions

42. Ms Thomas, Counsel, outlined the background and the specific circumstances of Dr Herbst's case.

43. She submitted that in terms of updates since the last hearing, the evidence was requested from Dr Herbst by letter, dated the 29 of May. This included:

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

44. She submitted that Dr Herbst's engagement since the last Tribunal has been limited. He has provided a letter dated the 17 June for the Tribunal's consideration. She submitted that the letter displays no insight into patient safety or public confidence issues, despite the doctor knowing that those were live issues that the Tribunal wished to have his insight into.

45. In terms of the issue of Insight, she submitted that Dr Herbst does state that he would cancel an operating list if he were unwell, and that acknowledgement is positive. However,

she submitted that there is limited analysis by the doctor as how he would manage any illness if it arose, and how he would ensure that he goes to work fully rested going forward. She submitted that this is the second incident when Dr Herbst has been found asleep at work.

46. She submitted that is no analysis over and above his explanation of being unwell in respect to the more recent incident as to how he found himself in this position on two occasions.

47. She submitted that the doctor in his letter has offered remorse for having gone to work whilst tired, however, still seeks to minimise his actions. He blames others to an extent for finding himself in this position. He maintains that it is partly the fault of his assistant that he fell asleep, and he has previously told the tribunal that his assistant should have tapped him on the shoulder or offered him a coffee.

48. She submitted that the lack of responsibility for his own actions limits his insight, this is the 2nd occasion he has fallen asleep whilst at work. She submitted that the doctor has indicated that he does not recall receiving a previous warning in relation to another incident, although he previously has accepted this, as detailed within the determination of the January 2024 Tribunal.

49. Ms Thomas submitted that Dr Herbst repeats the reason why he attended work due to being unwell, however, that explanation is limited, given that this is the second occasion that this has occurred.

50. She submitted that there is no insight, and the doctor does not appear to appreciate the gravity of his conduct. He said that patients are electronically monitored and alarms would go off if anything goes wrong and also that he has an assistant.

51. She submitted that Dr Herbst displays limited insight into his own role, without sufficient insight into the risk of patient safety and there is a real risk of repetition.

52. In terms of keeping his knowledge and skills up to date, he submitted that the doctor lists textbooks and journal articles in his letter, but which is helpful to an extent and does demonstrate some commitment to maintaining theoretical knowledge. She submitted there is no evidence of interactive or structured CPD simulation training or targeted courses.

53. She submitted that the doctor has indicated that it is difficult for him to do anything other than read because of the fact he has been living in Bolivia with no access to the Internet. However, the GMC observed that the doctor has returned to the UK now on a number of occasions. The most recent occasion being for three weeks.

54. She submitted that the doctor says that he has read more articles than those which are listed within his letter. She submitted that there is no evidence at all provided in relation to that and in terms of his learning from those articles.

55. In respect to the doctor's return to work plan, Dr Herbst said he would limit himself to simple cases, which is a positive step. She submitted that there is no formal or detailed plan.

56. Ms Thomas submitted that there is no evidence of engagement with a supported return to work process. She submitted that Dr Herbst's fitness to practise remained impaired by reason of his misconduct.

57. Dr Herbst submitted that he is sorry for going to work when he was feeling unwell. He said that he should not have gone to work when he was feeling tired, and he will not do so again in the future.

58. He submitted that he would like to express his sincere remorse for having done so and that it was motivated by the fact that he did not want to cancel the operating list.

59. He submitted that he has a professional education to perform his tasks in a safe manner and there is no impairment to his ability to practise in his job.

60. Dr Herbst submitted that he would like the Tribunal to reinstate him to unrestricted practice. He said he will practise without causing any safety issues.

The Relevant Legal Principles

61. 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 may assist a future Tribunal. This Tribunal is aware that it is for Dr Herbst to satisfy it that he would be safe to return to unrestricted practice.

62. 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

63. The Tribunal considered whether Dr Herbst's fitness to practise is currently impaired by reason of his misconduct. In reaching its decision, it has taken account of his oral evidence, all the documentary evidence presented to it, and the submissions made.

64. The Tribunal had regard to the determination of the March 2025 Tribunal, including what was clearly set out as to what would assist a future Tribunal at a review hearing. The Tribunal noted that the March 2025 Tribunal had made clear that at today's review hearing the onus would be on Dr Herbst to demonstrate how he has reflected on his actions, developed insight and taken steps to remediate.

65. In considering whether Dr Herbst's insight has developed, it first bore in mind the reflective statement he had provided.

'Once again, I would like to express my deepest remorse for having gone to work whilst tired. I was [XXX] but was unaware at that time and was reluctant to cancel the operating list.

In the meantime, I have gained insight. It is better to cancel an operating list than to come to work when feeling tired. In future, in case I feel even slightly unwell for any reason, I will cancel the operating lists.

I have provided over 100,000 anaesthetics and therefore would not easily forget how to give an anaesthetic upon returning to work. However, to be on the safe side I would initially do relatively simple work such as Day Surgery and not embark on cardiac or neonatal surgery. In your decision, kindly bear in mind that there is a massive shortage of anaesthetists and vast waiting lists'

66. The Tribunal was satisfied that Dr Herbst expressed genuine remorse for his misconduct. However, it considered that there had been no meaningful development in his level of insight. Indeed, the Tribunal found that the limited insight previously demonstrated in his written documentation and oral evidence had, if anything, receded. In particular, the Tribunal noted that he no longer accepted that he had been previously warned for similar misconduct and that he lacked appreciation of his personal accountability in the events, and of the serious implications of falling asleep during an operation for both individual patients and public confidence in the medical profession.

67. The Tribunal also took into consideration the list of books that Dr Herbst had read:

- Smith and Aitkenhead's Textbook of Anaesthesia.
- Macintosh and Bannister's Essentials of General Anaesthesia.
- Oxford Handbook of Anaesthesia.
- 10/06/2025, Preoperative thoracic paravertebral block provides greater benefits for body temperature protection in patients undergoing thoracoscopic lung surgery: a retrospective cohort study. (BMC Anaesthesiology.) 2 hours.
- 12/06/2025, Perioperative oxygen therapy: an overview of systematic reviews and meta-analyses. (British Journal of Anaesthesia.) 2 hours.
- 25/12/2024, Anaesthesia 2050: A Better Anaesthesia? (Anaesthesia & Analgesia.) 2 hours.
- 26/12/2024, The Future of Public Health and Perioperative Medicine. (Anaesthesia & Analgesia.) 3 hours.
- 05/01/2025, Remote Monitoring and Artificial Intelligence: Outlook for 2050 (Anaesthesia & Analgesia.) 3 hours.
- 10/01/2025, The Domains of Hemostasis: A Practical Approach in Critical Illness. (Anaesthesia & Analgesia.) 2 hours.
- 11/01/2025, Low Perfusion and Missed Diagnosis of Hypoxemia by Pulse Oximetry in Darkly Pigmented Skin: A Prospective Study. (Anaesthesia & Analgesia.) 3 hours.
- 15/01/2025, Influence of Neostigmine on Early Postoperative Cognitive Dysfunction in Older Adult Patients Undergoing Noncardiac Surgery: A Double Blind, Placebo-Controlled, Randomized Controlled Trial. (Anaesthesia & Analgesia.) 2 hours.

- 20/01/2025, Influence of Intravenous S-Ketamine on the Pharmacokinetics of Oral Morphine in Healthy Volunteers. (Anaesthesia & Analgesia.) 1.5 hours.

68. The Tribunal noted that Dr Herbst has not provided copies of any articles he has read. There was no substantive evidence of remediation, continuing professional development (CPD), or a return-to-work plan, as had been identified as necessary by the previous Tribunal. The doctor repeatedly stated that the Tribunal should “look at my records” and when pressed confirmed that he meant that the Tribunal should look at the CPD that he had provided to the March 2025 Tribunal. The Tribunal acknowledged that Dr Herbst is now based in Bolivia, where resources may be limited. However, it considered that no meaningful effort had been made by Dr Herbst to remediate his misconduct. In particular, the Tribunal noted there had been minimal effort to identify or undertake relevant courses, notwithstanding that cost-free options are available which would have enabled him to demonstrate learning and insight. It also noted that, whilst he now lives in Bolivia, he regularly visits the UK and told the Tribunal that he had returned to the UK three weeks before the review. He could have utilised that time to undertake relevant training and remediation but had chosen not to do so.

69. The Tribunal also took into account the length of time that has passed since Dr Herbst last practised. It noted that there was limited evidence to demonstrate that he had taken steps to keep his medical knowledge and skills up to date. The Tribunal was concerned that it has now been in excess of three years since Dr Herbst last engaged in clinical practice. Furthermore, the Tribunal was troubled by Dr Herbst’s oral evidence, in which he stated that he did not consider it necessary to maintain his knowledge, as in his view “nothing has changed in the past 10 years.”. The Tribunal noted that his reading was limited to text books and that he stated that the most recent book was published a few years ago, and so the Tribunal found that it could not be considered up to date.

70. The Tribunal was of the view that it was difficult to form a conclusive view as to Dr Herbst’s risk of repetition, the lack of evidence regarding any steps taken to remediate or keep his knowledge updated caused the Tribunal concern.

71. In those circumstances, the Tribunal determined that Dr Herbst’s overall insight remains incomplete and that the evidence of remedial efforts is insufficient. It was not satisfied that he has developed adequate insight into his actions, or into the impact of those actions on public confidence in the profession, such as would sufficiently mitigate the risk in

this case. No meaningful progress has been made since the March Tribunal and the only material change of circumstances is that the doctor has spent a further six months outside of practice and so will have become further deskilled. The Tribunal was therefore satisfied that there remains a risk of repetition of his misconduct. It further noted that Dr Herbst has not produced a return-to-work plan, sought opportunities to shadow colleagues, undertaken relevant courses, or engaged a mentor. It noted that many of those opportunities would not have required payment and so Dr Herbst's account of lack of funds does not adequately explain his inaction.

72. The Tribunal determined that the need to meet the overarching objective required a finding of impairment in order to protect the public and to maintain public confidence and to uphold standards in the medical profession.

73. This Tribunal has therefore determined that Dr Herbst's fitness to practise is impaired by reason of misconduct.

Determination on Sanction - 24/09/2025

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.

The Evidence

2. The Tribunal has taken into account the background to the case and the evidence received during the impairment stage of the hearing where relevant to reaching a decision on what action, if any, it should take with regard to Dr Herbst's registration.

Submissions

3. Ms Thomas, Counsel, referred the Tribunal to the appropriate paragraphs in the Sanctions Guidance (2024) ('SG') and submitted that the appropriate and proportionate sanction is a period of suspension.

4. In terms of mitigating factors, she submitted that there were limited mitigating factors. She submitted that Dr Herbst has expressed some remorse and has apologised for his actions and he is starting to gain perhaps some insight but it is insufficient.

5. In terms of aggravating factors, there is a lack of full insight. Dr Herbst continues to minimise his misconduct and place the blame to some extent on others. He was subject to a previous warning at the time of this incident and his level of insight and remediation has not adequately developed since the last tribunal in March of this year. In fact, there is little change in the evidence before this Tribunal than there was before the March 2025 Tribunal.

6. She submitted that a further period of suspension should be imposed to protect the public given the risk to patient safety in this case, particularly in light of Dr Herbst's time away from clinical practice, and the fact that he has not kept up to date with his medical skills and knowledge. She submitted that a further suspension would maintain public confidence in the profession.

7. Dr Herbst submitted that he is sorry he went to work feeling tired when he was XXX working in the NHS. He said that he will never ever go back to work while unwell. If he feels slightly unwell, he will cancel the operating list despite the fact that it would cause a great deal of discomfort for patients who have been waiting for surgery.

8. He submitted that he is happy at the moment with his work in agriculture. It has certain advantages and there is good freedom.

9. Dr Herbst submitted that, at this stage, he is prepared to resign voluntarily. But if he is suspended, he will come back with further CPD. In terms of practical means, there is nothing that is available. He cannot go into a hospital, he said he will try and find some support, but it is unlikely to be successful, and he is concerned that doing so would impact upon his dignity.

The Relevant Legal Principles

10. The Tribunal is aware that the decision as to the appropriate sanction, if any, to impose on Dr Herbst 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 Ms Thomas 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 interest with the public interest.

The Tribunal's Determination

Aggravating and mitigating factors

12. Before considering what action, if any, to take in respect of Dr Herbst's registration, the Tribunal first considered the aggravating and mitigating factors present and referred itself to its findings on impairment.

13. The Tribunal found the following to be aggravating factors in this case:

- Dr Herbst had not demonstrated timely development of full insight. The Tribunal considered his written reflections and oral evidence were limited and show a lack of development of insight since the March 2025 review;
- He has failed to follow clear and achievable recommendations of the previous Tribunal and has not made adequate effort to do so;
- Dr Herbst was subject to a warning for similar conduct at the time of events;
- Dr Herbst has been out of clinical practice for over three years and therefore there is a significant risk of deskilling, particularly in light of the lack of meaningful effort he has undertaken to maintain his skills and knowledge, despite this being an area of concern identified to him by the March 2025 Tribunal.

14. Having identified the aggravating factors in the case, the Tribunal identified that Dr Herbst had previously demonstrated some insight into his original failings and there had been some remediation of the original concerns in his case, albeit there has been no further progress since the March 2025 review.

No action

15. 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

16. The Tribunal next considered whether imposing an order of conditions on Dr Herbst's registration would be appropriate. It bore in mind that any conditions imposed should be appropriate, proportionate, workable and measurable.

17. The Tribunal noted that Dr Herbst has not been working during the last 3 years. The Tribunal was not satisfied that he would comply with conditional registration in the future.

18. The Tribunal is of the opinion that a period of conditional registration would not adequately protect the public given the extensive level of deskilling that will have inevitably resulted from Dr Herbst's absence from medical practice.

19. The Tribunal noted that conditions would not maintain public confidence in the medical profession or professional standards. This is because of Dr Herbst's failure to adequately engage with the proceedings to develop his insight and remediation, and the lack of progress achieved in showing maintenance of his skills and knowledge. The Tribunal considered, given the history of this case, it could not formulate workable conditions that would protect the public interest and maintain public confidence in the medical profession. Further, the Tribunal noted that Dr Herbst stated that conditions would be "impossible". In light of that response, together with Dr Herbst's failure to follow the recommendations of the March 2025 Tribunal, the Tribunal was satisfied that there was negligible prospect of him complying with conditions of practice.

20. The Tribunal has, therefore, determined that it would not be sufficient to direct the imposition of conditions on Dr Herbst's registration.

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 noted that Dr Herbst's original hearing was in 2024. Whilst previous Tribunals found that Dr Herbst had made some progress towards a safe return to clinical practice, this Tribunal found that his progress had not only stalled but had receded, in so far that he no longer accepts that he was warned for behaviour similar to that which has led to the current finding of misconduct. Dr Herbst provided no adequate evidence to demonstrate that he has kept his clinical knowledge and skills up to date. He has not practised medicine in over 3 years and has foreseeably deskilled.

23. The Tribunal had regard to the lack of evidence of remediation in this case as well as its assessment of Dr Herbst's insight and the risk of repetition. The Tribunal noted that the SG indicated that an absence of evidence of remediation indicated that suspension may not be appropriate. There was no basis or evidence upon which the Tribunal could place any reliance that Dr Herbst would be prepared to engage in remediation or that any such engagement would be successful.

24. Although a further period of suspension could be considered to be a proportionate response, there is no evidence that the previous orders of suspension have improved Dr Herbst's insight. The Tribunal was of the view that, on a practical level, the order of suspension has had a limited impact. It was not satisfied that suspension was having the desired effect on Dr Herbst, as he has not provided any evidence of improved insight or remediation. He failed to adequately articulate what he would do if given a further period of suspension to demonstrate developing insight and remediation. The Tribunal therefore considered it far more likely than not that any future Tribunal would find itself in the same position as this Tribunal, save that more time would have passed. Further, there still remains a concern of a risk of repetition and therefore consequent risk of harm to patients and further damage to the reputation of the medical profession.

25. The Tribunal was therefore of the view that the paragraphs of the SG relating to suspension, as set out above, were insufficiently satisfied in Dr Herbst's case. The Tribunal concluded that Dr Herbst has shown a persistent lack of insight. The absence of any evidence

of remediation, and the assessed risk of repetition, led the Tribunal to conclude that a sanction of suspension is not appropriate at this stage.

Erasure

26. The Tribunal therefore went on to consider whether the sanction of erasure was appropriate and proportionate.

27. The Tribunal had regard to paragraphs 109 (j) of the SG and considered they were particularly relevant in Dr Herbst's case:

109 Any of the following factors being present may indicate erasure is appropriate (this list is not exhaustive).

...

j Persistent lack of insight into the seriousness of their actions or the consequences.'

28. The Tribunal was conscious that previous Tribunals had determined that an order of suspension would give Dr Herbst time to demonstrate insight and remediation for his misconduct. This is now the third review of Dr Herbst's case, and he has provided limited evidence to show that he has addressed the concerns of the 2024 and 2025 Tribunals.

29. Given the lack of progression since Dr Herbst was suspended, the Tribunal was not satisfied that further time to reflect at this stage would have any real impact on Dr Herbst. It is unlikely that any additional period of suspension would improve the likelihood of Dr Herbst engaging with the regulatory process.

30. The Tribunal was satisfied that there was a lack of meaningful engagement from Dr Herbst, and he had failed to demonstrate adequate development of insight or remediation since he was suspended in 2024. The Tribunal considered that a sanction of erasure was the only sanction that would address Dr Herbst's persistent failure to demonstrate insight and failure to demonstrate a willingness to maintain his skills and knowledge. Given Dr Herbst's failure to demonstrate these matters, despite being repeatedly advised to do so by previous Tribunals, this Tribunal had no confidence that he would take advantage of any further

opportunities. It determined, in those circumstances, that erasure was the only sanction that would be sufficient to uphold the three limbs of the statutory overarching objective: to protect members of the public, to maintain public confidence in the profession and uphold proper professional standards.

31. The Tribunal have directed to erase Dr Herbst's name from the Medical Register. 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 suspension will remain in place during the appeal period.

32. That concludes this case.