

PUBLIC RECORD

Dates: 25/07/2024

Medical Practitioner's name: Dr Thomas HERBST

GMC reference number: 3270242

Primary medical qualification: State Exam Med 1988 Freie Universität Berlin

Type of case	Outcome on impairment
MPT Review	Impaired

Summary of outcome

Suspension – 6 months

Tribunal:

Legally Qualified Chair	Mrs Jayne Wheat
Lay Tribunal Member:	Mrs Jane Johnson
Medical Tribunal Member:	Dr Andy Cohen
Tribunal Clerk:	Ms Fiona Johnston

Attendance and Representation:

Medical Practitioner:	Present, not represented
GMC Representative:	Mr Julian King, 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 - 25/07/2024

1. At this review hearing the Tribunal 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.

Background

2. Dr Herbst qualified in 1988. Prior to the incident on 27 September 2022, Dr Herbst 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').

3. The background to the matters is that on 27 September 2022, Dr Herbst was found to be asleep whilst in charge of an anaesthetised patient in an operating theatre at the hospital. Furthermore, seen shortly thereafter, it is alleged that he was speaking incoherently and was unsteady on his feet. At the time of the incident, it is alleged that Dr Herbst was subject to a warning for similar conduct.

The January 2024 Tribunal

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

5. The January 2024 Tribunal found the facts relevant to impairment found proved. 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.

6. 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.

7. 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. The January 2024 Tribunal determined that the behaviour in 2022 was more serious, as he had been made aware of the risks posed to patients in falling asleep during a procedure.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. The January 2024 Tribunal directed a review of Dr Herbst's case. It noted that the onus was on Dr Herbst to demonstrate how he had reflected on his actions, developed insight and taken steps to remediate. It noted that it may assist the reviewing Tribunal if Dr Herbst provided:

- Insight into the impact of his actions on patient safety, the public interest and public confidence in the medical profession by further reflection following the Tribunal's findings;
- Evidence that he has maintained his medical knowledge and skills during the period of suspension;
- Evidence regarding any health factors which he (on reflection) might consider to have contributed to his actions;
- Information of any strategies that Dr Herbst may be able to use to prevent such an incident from occurring again.

Today's Review Hearing

The Evidence

14. The Tribunal has taken into account all the evidence received, and of the submissions made by the parties.

15. The Tribunal received documentary evidence which included, but was not limited to: previous Determinations of the MPT hearings dated 3-12 January 2024; Email exchanges and a letter from Dr Herbst with reflections and list of CPD.

Submissions

On behalf of the GMC

16. Mr Julian King, Counsel, on behalf of the GMC, submitted that Dr Herbst's fitness to practise remains impaired by reason of his misconduct. He submitted that Dr Herbst has engaged in a limited way only with the findings of the January 2024 Tribunal. He has not

provided any meaningful evidence of insight or remediation. He has provided a list of activities, but there are no dates to the activities, there is no evidence of online/ face to face courses or webinars.

17. He submitted that Dr Herbst's letter doesn't demonstrate adequate insight; he acknowledges the impact of his failings on patient safety but has failed to expand on this. He submitted that the doctor has not offered an apology or shown little remorse.

18. He referred the Tribunal to Dr Herbst's submissions '*I will only go to work when I am completely well and fully rested*' He submitted that there is no detailed explanation as to how adequate rest would be achieved.

19. He reminded the Tribunal this is the second occasion Dr Herbst has been found asleep, and with the limited degree of insight displayed, this cannot rule out repetition in the future.

20. He submitted that given the lack of documentary evidence, it appears that Dr Herbst does not appreciate the gravity of his misconduct and has not taken any meaningful steps to remediate. It is for these reasons that Dr Herbst's fitness to practise remains impaired.

Dr Herbst

21. Dr Herbst submitted that he sincerely regrets his actions, at the time XXX. He said he will not go to work unless completely well. Dr Herbst said that he would like to criticise the approach of the GMC, who persecute doctors without an end. He described the GMC as punitive and vengeful.

22. He submitted that he does have not the money to go to conferences or webinars. He said he has spent two weeks attending lectures at a university in Germany. He submitted that he has done enough study to maintain his medical skills.

23. He submitted that he has the insight necessary to maintain patient safety. Dr Herbst said he regretted going to work when not in great shape. He has learned his lesson and will not go to work unless completely well.

24. Dr Herbst submitted that there was irony in applauding NHS workers for working in not great conditions but then a year later, when a doctor XXX, adopting a punitive approach.

He asked the Tribunal to consider how much punishment to be heaped on a doctor who has tried his best for the last 40 years and not caused harm. He submitted that the GMC uses vengeful methods.

25. Dr Herbst told the Tribunal that *'I don't know what else you want me to say...without telling me what to reflect on'*. Dr Herbst posed the question; *'Do you want me to self-flagellate'*.

26. Dr Herbst was directed to the bullet points setting out the information the last Tribunal considered might be of assistance to this reviewing tribunal. He referred to patient safety in his case being met by not going to work when tired, and it being a balancing act of considering patient's interests when deciding whether to cancel a list. He referred to being told *'don't turn up even if slightly tired'*.

27. In relation to the public interest, Dr Herbst submitted that the public would be concerned if a doctor was unwell or not in optimum shape.

28. Dr Herbst told the Tribunal that he had produced evidence of keeping his knowledge and skills up to date, and that he was healthy other than having XXX.

29. Dr Herbst submitted that it was wrong of the GMC to deprive a person of their livelihood and it is the wrong approach.

The Relevant Legal Principles

30. At a review hearing, the burden is on the doctor to demonstrate that all the concerns which have been identified previously have been adequately addressed, and that remediation has taken place.

31. The Tribunal reminded itself that the decision in relation to impairment is a matter for the Tribunal's judgement alone. As noted above, the January 2024 Tribunal set out the evidence that a future Tribunal may be assisted by. This Tribunal is aware that it is for the doctor to satisfy it that he would be safe to return to unrestricted practice.

32. 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

33. The Tribunal had regard to the findings of the January 2024 Tribunal, including their findings of the level of Dr Herbst's insight and reflections and the further evidence that it thought might be of assistance in determining whether D Herbst's fitness to practise remained impaired.

34. In reaching its decision, the Tribunal bore in mind that its primary responsibility is to the statutory overarching objective which is as follows:

- To protect, promote and maintain the health, safety and well-being of the public;
- To promote and maintain public confidence in the medical profession;
- To promote and maintain proper professional standards and conduct for members of that profession.

35. In reaching its decision, the Tribunal took into account Dr Herbst has engaged with the regulatory process, and submitted a letter containing some reflections for this review, summarised here:

'My reflection on being tired or sleepy is that doctors must always be fully alert.

Despite there being additional and redundant safety precautions, such as having an assistant and multiple electronic monitors and alarms, in the end it is me who is ultimately responsible for the safety of a patient.

Going to work when not feeling completely well could potentially have increased the chance of an adverse event.

To prevent any such further event of tiredness at work, I will only go to work when I am completely well and fully rested.

In case of being even slightly tired I will not hesitate to cancel the operating list.

My health is good apart from XXX.

The infection XXX which caused the tiredness in September 2022 is long gone’.

36. However, it bore in mind the limited insight, remorse and remediation by Dr Herbst as found by the January 2024 Tribunal. At this review hearing, the onus was upon Dr Herbst to demonstrate whether his levels of insight, remorse and remediation had developed sufficiently to mean that his fitness to practise could be said to be no longer impaired.

37. The Tribunal considered that this position has not changed significantly since the hearing in January 2024.

38. The Tribunal considered that Dr Herbst has not offered or demonstrated any meaningful apology or shown anything other than superficial remorse into his misconduct. It noted that Dr Herbst attempted to deflect his misconduct and sought to blame the GMC for their *‘punitive approach’*.

39. The Tribunal considered that Dr Herbst has demonstrated only a superficial level of insight into the risk to patients of his actions. His reflections are 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. Dr Herbst has not engaged with the findings, focusing instead on determining not to go to work if tired. The Tribunal considered his reflections to be inadequate, and that Dr Herbst had adopted a casual approach to matters of insight, remorse and remediation. The Tribunal was of the view that Dr Herbst had not properly addressed the matters that the January 2024 Tribunal had set out as likely to assist this Tribunal. The 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 Tribunal could rely, that Dr Herbst is safe to return to unrestricted practice.

40. In relation to public confidence in the profession, it was only at the Tribunal’s prompting that Dr Herbst expressed that the public would be concerned if a doctor was at work whilst unwell. Again, the Tribunal concluded that this demonstrated a lack of real insight and understanding of how public confidence would have been undermined by the findings of the January 2024 Tribunal, that Dr Herbst was asleep during a surgery.

41. In relation to keeping skills and knowledge up to date, there is new evidence provided to demonstrate that Dr Herbst completed some CPD, but it consists of a list only, it is scant, and inadequate, in that he has not provided the dates or certificates to evidence he has actually undertaken the training and when it was completed.

42. The Tribunal noted that Dr Herbst did not provide any evidence or reflection upon whether or not there are any underlying health issues which might have contributed to the misconduct.

43. In all the circumstances, the Tribunal has determined that Dr Herbst's fitness to practise remains impaired on all three limbs of the overarching objective.

44. This Tribunal has therefore determined that Dr Herbst' fitness to practise remains impaired by reason of misconduct.

Determination on Sanction - 25/07/2024

45. Having determined that Dr Herbst's fitness to practise is impaired by reason of his 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 Dr Herbst' registration.

The Evidence

46. The Tribunal has taken into account the background to the case and the evidence received during the earlier 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

On behalf of the GMC

47. On behalf of the GMC, Mr King submitted that the current period of suspension should be extended for another six months. He submitted that, in the absence of significant evidence from Dr Herbst concerning remediation and / or the development of insight, it would not be appropriate to take no action and conditions would be ineffective. He submitted that suspension was the least restrictive and proportionate sanction.

48. Mr King submitted that the letter from Dr Herbst was insufficient, and if there was no further engagement, erasure may be considered, but that the case was not at that point yet. He said if there was further, meaningful engagement in the terms already suggested, and further reflection, plus evidence of relevant courses undertaken with dates and proof, as well as information about strategies in place to prevent repetition, then a further 6 months suspension would be appropriate.

49. He submitted that a review should be directed to give the doctor a chance to demonstrate that he understands patient safety through his reflections. He further submitted that Dr Herbst may consider providing any information on factors affecting his health which would help to prevent any repetition in the future.

Dr Herbst

50. Dr Herbst submitted that the first warning for being sleepy was issued 3 years ago, and it had expired by the end of the hearing in January 2024. With regards to certificates, he submitted that he does not write down the dates, he is not good at paperwork, he said what is important is what he has learned. He submitted that certificates cost money and he has 3 children to feed and cannot afford it.

51. With regards XXX, but it is controlled and does not affect the ability to work. He said that he has shown insight and remorse. He has apologised 100's of times for being tired and sleepy. He said he has addressed the points set out by the previous Tribunal to a sufficient extent.

52. He said that he has taken steps when he is able to work, he will not go to work if he feels unwell. He will pay attention to patient safety; he has been a safe pair of hands for decades and he cannot engage constructively any more than he has.

53. He said that he thinks as a general principle it is highly unfair that the GMC and the MPTS have got the absolute power to decide whether he has shown enough remorse, enough regret, enough apologies. If the Tribunal disagree, then they just have to agree to disagree on this matter. He said the GMC has a vendetta against him over an incident that happened some years ago that led to a complaint to the GMC, meaning he was unable to work for half a year. He said he was reported for stopping and buying a bottle of wine and carrying it in the back of a private ambulance.

54. He said that when he tells that story to other doctors, especially in Europe, there is a huge cultural difference between the UK and the rest of Europe, and they think it is a ridiculous thing that the GMC decided to take it upon itself to persecute him on that incident for half a year until they finally decided that it was nonsense to do so.

55. He submitted that he likes to speak his mind and he knows that sometimes makes enemies and sometimes makes him less popular, and it may well be the reason for complaints in the past. He said that the GMC and MPTS are making his life a misery. He has three children to look after and thinks the whole proceedings are stacked against him. He said without a legal arrangement, he basically has got no way of defending himself.

56. He submitted that he would like the Tribunal to reconsider its decision on impairment because it is the wrong one, most reasonable people will think it is the wrong one. He said he would like the Tribunal to reinstate his registration. He said if there has to be restrictions applied to his registration it has to be minimal otherwise work will be impossible. He said that having the GMC attached to you is worse than the bubonic plague.

57. Dr Herbst suggested that maybe someone writing a report after a couple of months back at work would be suitable, but not supervision, as that makes work impossible. He asked the Tribunal to reconsider its decision on impairment as it was the wrong one.

The Tribunal's Determination

58. The Tribunal reminded itself that the decision as to the appropriate sanction to impose, if any, is a matter for this Tribunal exercising its own judgement.

59. In reaching its decision, the Tribunal has taken account of the Sanctions Guidance and the overarching objective. It has borne in mind that the purpose of a sanction is not to be punitive, but to protect patients and the wider public interest, although it may have a punitive effect.

60. Throughout its deliberations, the Tribunal applied the principle of proportionality, balancing Dr Herbst's interests with the public interest. It also had regard to the overarching objective, which includes to protect, promote, and maintain the health, safety, and wellbeing of the public, promote and maintain public confidence in the medical profession, and to

promote and maintain proper professional standards and conduct for members of the profession.

61. In reaching its decision in this case, the Tribunal had regard to its decision upon 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 has presented little further evidence, the Tribunal found itself in a similar position to that of the January 2024 Tribunal. The Tribunal determined that, despite being suspended for six months, he 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.

62. It is the Tribunal's view that Dr Herbst has demonstrated a casual attitude to the regulatory process. The Tribunal were 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'*. Dr Herbst was unable to accept the findings of this Tribunal, and told the Tribunal they were wrong. The Tribunal concluded that such comments reinforced the finding that Dr Herbst has demonstrated very limited insight into his misconduct.

63. The Tribunal considered each sanction in ascending order of severity, starting with the least restrictive. In coming to its decision as to the appropriate sanction, the Tribunal first considered whether to conclude the case by taking no action. The Tribunal determined that there were no exceptional circumstances to justify taking no action in this case. Dr Herbst has not developed sufficient insight or demonstrated any remediation. Given the seriousness of this case, taking no action would not protect patients, would undermine public confidence in the profession and would not uphold proper professional standards.

64. The same rationale applies to why a period of conditional registration is not appropriate. As set out by the January 2024 Tribunal, it was difficult to envisage what sort of conditions would prevent this behaviour happening again, when Dr Herbst has not developed insight or remediated the misconduct. The Tribunal therefore determined that conditions would be neither proportionate nor workable in the circumstances of this case and, given the serious nature of its findings, would fail to uphold the statutory overarching objective of protecting patients, maintaining public confidence and declaring and upholding standards.

Suspension

65. The Tribunal went on to consider whether to impose a further period of suspension. In reaching its determination, the Tribunal was of the view that, while serious, Dr Herbst's misconduct was not fundamentally incompatible with continued registration and was capable of remediation, through the development of insight, attending relevant courses and developing strategies to prevent any recurrence of the misconduct.

66. The 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 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.

67. The Tribunal considers that erasure would be a disproportionate response at this time, when it has concluded that this is misconduct that is capable of remediation.

68. In all the circumstances, and taking into account the principle of proportionality, the Tribunal have determined to suspend Dr Herbst's registration for a further six months. This period of time would allow Dr Herbst another opportunity to develop insight, show meaningful reflection and demonstrate that he had satisfactorily remediated such that there was no longer a risk of repetition. An extension of six months to the suspension order is, in the view of the Tribunal, the appropriate sanction required to protect 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 the profession.

69. 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, unless an early review is sought by either Dr Herbst or the GMC. The Tribunal wishes to clarify that at the review hearing, the onus will be on Dr Herbst to provide evidence demonstrating how he has developed his insight and remediated his misconduct and maintained his clinical knowledge and skills. It therefore may assist the reviewing Tribunal if Dr Herbst provides:

- 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;

- Any other information that he considers will assist a review hearing, including evidence of strategies developed to prevent the misconduct from recurring.

70. That concludes the case.