



# Arbitration Award Rendered

Case Number: **KNDB1191-19**

Commissioner: **Karen Charles**

Date of Award: **20-Oct-2019**

In the **ARBITRATION** between

**PSA obo Baijnath, Mukesh H.**

(Union/Applicant)

and

**National Health Laboratory Services**

(Respondent)

Union/Employee's representative: **D Govender**

Union/Applicant's address: **P.O. Box 4011**

**Durban**

**4000**

Telephone: **0313103600**

Telefax: **0866152466, 0313103615, 0313103616, 0872347570**

E-mail: **rama.naidoo@psaftss.co.za, nono.moabi@psa.co.za,**  
**deeda.govender@psa.co.za**

Employer's representative: **B Hlatshwayo**

Respondent's address: **149 Prince Street**

**Durban**

**4001**

Telephone: **0313276700**

Telefax: **0313373329**

E-mail: **promise.mncube@nhls.ac.za; Bheki.hlatshwayo@nhls.ac.za**

## DETAILS OF THE HEARING AND REPRESENTATION

1. The arbitration was heard at the CCMA offices in Durban on the 15 and 16 July 2019 and finalized on the 1 and 2 October 2019. The parties sought a 7-day period to file their closing arguments which was granted. Both parties submitted their closing argument by the 9 October 2019.
2. The union official, Deeda Govender, represented the applicant. And Mr Bheki Hlatshwayo from Employee Relations represented the respondent.

## ISSUE TO BE DECIDED

3. Whether the respondent had unfairly dismissed the applicant from its employ?

## BACKGROUND TO THE MATTER

4. The applicant referred the matter to the CCMA for conciliation on the 30 January 2019. The matter remained unresolved at the conciliation on the 15 February 2019 and was then referred to arbitration on the 18 February 2019 and is now before me.
5. The parties signed and filed a pre arbitration minute marked "C" which set out the terms of reference for the arbitration proceedings.
6. Both parties handed in bundles marked "A" and "B" respectively.
7. On the 2 October 2019, in a side caucus with the representatives, I cautioned against any allegations of victimization, and that should this be the applicant's case there would be issues with the jurisdiction. Govender reassured that the applicant was not averring victimization.

## SURVEY OF THE EVIDENCE AND ARGUMENT

8. In opening, Hlatshwayo submitted that applicant had been charged with a failure to follow instructions and a failure to adhere to the respondent's code of conduct. The applicant had not disputed the allegations at the enquiry and this had been an admission of gross misconduct and had warranted a termination of employment.

9. There had been previous corrective action put into place but the applicant's conduct had not changed. The applicant had appealed only against the sanction; namely the severity of the sanction but not against his plea of guilty. This amendment to the plea impacted yet again on any potential trust relationship between the parties.
10. Govender submitted that the applicant had been induced to plead guilty by both his representative and Hlatshwayo at the enquiry stage in order that he would be awarded a lesser sanction than dismissal. At the arbitration he will submit that he was not guilty of the allegations. There are 3 divisions within the workplace; chemistry, microbiology and hematology. The evidence will show that the applicant was in the chemistry division where he worked unassisted. This division is the busiest and largest section. It deals with patient blood samples. It was his function to supply results for prognosis and patient care.
11. It is common cause that on 2 September 2018, on a Sunday, after hours, the applicant was given an instruction to complete one analyte and thereafter to complete a verification for all chemistry tests within a two-week period (14 September 2018) and send the results to a certain Ngubo and cc his manager.
12. It is the same instruction that the respondent alleged the applicant failed to carry out up until 28 October 2018. Evidence will show that the instruction was unreasonable and it was a theoretical exercise to determine the applicant's ability and to determine an understanding of a training session he had undergone a day or two earlier.
13. This exercise did not materially impact or compromise patient care and to have attempted the exercise would have meant that the applicant would have had to abandon his important duties on the chemistry bench.
14. The applicant therefore requested assistance in order to comply with the instruction which, by the respondent's own admission, was only provided on the 11 September 2018, some 9 days later. The respondent cannot allege this had been a reasonable instruction.
15. Evidence will show that having been provided with the assistance, the applicant complied with the instruction.
16. Having completed this analyte verification, on 12 September 2018, the applicant emailed the results to himself in error instead of his manager. This was a human error. There was no follow up by the manager and the applicant assumed that he had sent it off correctly. The respondent then withdrew its support in respect of the remaining verifications on the 13 September 2018.

17. He was unable to complete the instruction because the assistance had been withdrawn and he informed the manager that he was not in a position to continue and he in turn informed the applicant via email that this complaint was noted. The applicant understood this to mean that it was okay.
18. There was a procedural irregularity in that the chairperson reached a conclusion without any basis in that he referred to the applicant's behavioural pattern of previous years and that had caused him to sanction him with a dismissal. There was no such evidence before him to reach such a conclusion.
19. The applicant sought reinstatement with retrospective benefits.

## THE RESPONDENT'S VERSION

20. **HARICHANDER RAMGUNN (HR)** testified that he was the laboratory manager and the applicant reported to him.
21. On the 16 September 2018, he had written a letter of complaint to HR (A:12). The applicant was then charged (A:7 and 8).
22. On 1 August 2018, he had sent an email to the applicant (MB) requesting him to comply with an instruction. The applicant replied that this instruction was noted with reservation (A:13).
23. On 8 August 2018, he asked for progress (A:15).
24. The applicant was employed as a medical technologist and at the time of his dismissal, he had been based at a work station that performed chemistry analysis of blood samples. The task he had been allocated to do was verification of chemical analytes. This was done before blood samples for patient results can be released. The request was made to have this verification done because the historical verification done on the instrument could not be found and the applicant, the quality designate, had been unable to produce the previous verification results.
25. The verification was done to determine precision, accuracy and linearity of a test. In October 2018, an audit was to be performed and therefore verification was required. Otherwise the audit would lead to a result of non-conformance.



26. The applicant's response to the request for a progress report on the 8 August 2018 had been that he was adjusting to work flow.
27. HR replied that the workflow had nothing to do with completing the template (A: 17 and 18). On 15 August 2018, he yet followed up again and the applicant responded that the request was noted with reservation.
28. On 16 August 2018, he believed that the applicant required some counseling on the tasks to be performed. There existed the possibility that he had a problem that he needed to explain.
29. He had a session with the applicant on the 20 August 2018 (A : 87 to 92). From time to time, staff were allocated tasks over and above their daily tasks. The reason for this was that the lab had been earmarked for lab accreditation.
30. On 2 September 2018 (A: 23), he wrote him an email instructing him yet again to do just one analyte so that they would see that he understood what was required of him. The applicant wrote an email on 3 September 2018, expressing concerns (A: 24) about a lack of support.
31. On 4 September 2018, he wrote a response to this email.
32. An analyte was a test of a specific chemical. This instruction on the 4th had been to perform just one test of the exercise so that he could see that the applicant had made an attempt to doing the verification.
33. This was done in the light of the explanation tendered by the applicant (A: 24).
34. On 10 September 2018, (A: 26), the applicant requested an action plan. The witness then provided him with a response on 11 September 2018, indicating that he would be given help for one hour every day to complete the exercise. There is a diary entry to indicate that he was afforded the time to do the one analyte and Sphiwe had been instructed to assist him on the bench (A:30) between 10h30 and 11h30.
35. On 20 September 2018, he sent an email to his second in charge (A: 32) requesting times when Sphiwe assisted on the bench. She responded with a schedule of the times he did so.
36. A: 33 was a list of the aggravating factors included in the disciplinary enquiry bundle. These incidences had occurred between July and August 2018.

37. On 29 August 2018, the applicant was allocated a task to lead a team to do some analysis and to report to him. This was not done. (A: 41 and 42).
38. The respondent's disciplinary code runs from pages A: 56 to 71.
39. At A: 168 to 190 is the actual exercise conducted and completed in 11 hours by Afsana Ballim, a medical technologist employed by the respondent.
40. On 10 December 2018, the applicant entered his office and bullied him, accusing him of having something against him (A: 137).
41. On 7 August 2018 a meeting was held with the applicant.
42. He had also been counseled on 9 June 2017 (A: 131).
43. The applicant appealed on the severity of the sanction (A :80).
44. He explained that at B: 8 was an email to him from the applicant seeking an action plan. His reply is at B:9.
45. On 12 September 2018, the applicant addressed an email to him attaching the verification.
46. The first time that the respondent had become aware that the applicant had emailed himself the verification was at the appeal hearing on 18 January 2019. He himself only saw this email (B:10) for the first time at the arbitration proceedings.
47. The disciplinary enquiry notice was dated the 21 November 2019.
48. To date, he has not seen the verifications from the applicant.
49. On 13 September 2018 he had expected him to conduct the verification because the chemistry analyzer had not been functional. This was the operational challenge. This would not have affected the verification exercise.

50. In the counseling session on 20 August 2018, in the action plan agreed upon, he agreed to certain things such as focusing on the job, etc. (A: 90).
51. He had assisted the applicant and an example was set out at B:12.
52. On cross-examination, he confirmed that the applicant worked under a license. If an analysis of a sample was performed incorrectly, he may lose his licence.
53. He had no axe to grind with the applicant. It was true that the applicant had filed a grievance against him as a result of a refusal to grant him temporary incapacity leave.
54. He had erred in placing the date of 1 August 2019 (A:12) on the complaint.
55. The incidents of August had led to the charges. Had the verification occurred as instructed on 1 August 2018, the charges would not have been preferred (A:13 and 15).
56. From the time the applicant started work, whenever he was unhappy with something he would say *"noted, with reservation."*
57. The applicant had asked for overtime to complete the verification; however, HR had been cautioned against overtime, especially since this verification could have been during office hours. The applicant had been allocated one bench with one set of duties. He had given him two weeks to perform the verification. The verification for one analyte could be done in one hour.
58. He could not justify the request for overtime.
59. The applicant's job description is to analyze pathological samples. The verification could be delegated to a subordinate. He had three technologists and two technicians under his control. He had chosen the applicant because he had been allocated the chemistry bench and he had been the QA at the workplace and he had worked at Albert Luthuli as an QA supervisor. The QA has the best knowledge of doing the verification.
60. During counseling he had requested the training, therefore he had provided it to him.

61. There were days in the lab when there were two technicians who did the samples and he performed the verifications. The applicant took no responsibility of any other functions, such as health and safety, writing of SOPS. These tasks had to be allocated to others working on other benches. Other employees were also given additional tasks.
62. If one is organized on the bench, managed one's time well, one would be able to do the verification.
63. He did tell the applicant that he was capable of doing the task in his own time (A: 24).
64. It is true that the applicant's birthday was on the 4<sup>th</sup> September 2018 and that it is probable that he did give the applicant the day off.
65. The onus would have been on the applicant to provide proof that he had sent in the verification exercise (B:10).
66. He conceded that A: 6 may indicate that he was not refusing but saying that without assistance he could not complete the instruction.
67. Govender put it to him that between 5 and 10 September, HR did nothing about the instruction. It was put to him that by asking for a statement he had already a pre-conceived idea to take disciplinary action. He denied that.
68. It was only on the 11 September 2019 that there was direct intervention. He explained that the laboratory environment did not warrant immediate assistance for ad hoc duties. The task had been allocated at the beginning of August 2018. In September, there had been counselling and training and retraining. The applicant had requested an action plan which he couldn't understand because the action plan should actually come from the applicant.
69. Assistance had been given on the 11 September 2018 and still he did not receive the task. He did not receive the document that had been incorrectly sent to himself (D:1 to 4). He had first seen the document about two weeks after the arbitration had sat in July 2019.
70. The applicant sent them to himself and had he sent it to the witness, it is probable that they would not be here at the arbitration.
71. He did not know the intention of the applicant. The IT system would have told him that the email had been received by himself. The applicant would have received the email instantaneously and even if not,

then it would have been there the next time he sat down at the computer. This was not been raised at the hearing or at the appeal.

72. D: 1 to 4 is just part of the task to be completed. There were numerous analytes that should have been done. And at 11 September 2018, whilst he had completed the one analyte as per the instruction (A: 9), there were still many more parameters to be done.
73. After completing this one analyte, he had yet to complete the balance.
74. He conceded that the applicant had complied with the instruction, even whilst he had not received it.
75. The applicant sent him an email on 13 September 2018 informing him that the intervention had not occurred because of the breakdown or the staff member had not been available (A:11).
76. The witness denied that there had been a personal discussion between him and the applicant. The reason for this was that the applicant demanded only email correspondence. He reiterated that there had been no discussion between them. He merely noted in the applicant's email that the assistance had been given.
77. He had provided assistance on the 11, 12, 17, 18 19 and 20 September 2018 for one hour. He had honoured his obligations to the applicant.
78. Sphiwe had not been on duty on 13<sup>th</sup> and there had been problems with the instrument. The instrument had still been down on the 14<sup>th</sup> and restored only at 14h30 that day. During this time, the applicant could have performed the verification.
79. Each individual employee was allocated tasks and Sphiwe had done his own work on 14<sup>th</sup>.
80. The word "noted" meant that he had accepted acknowledgement of the assistance. He had informed him that he had gone beyond his allocated time to perform the tasks.
81. It is convenient to say now during these arbitration proceedings that HR should have done this or that. He monitored the whole lab and all the clients to answer to and it was not possible to babysit professionals.
82. At A: 12 and 13, 14 to 18 is evidence of a failure to follow an instruction that led him to consider disciplinary action for the 5 November 2018. Upon his explanation, the discipline action had been withdrawn. The enquiry scheduled for the 5 November 2018 (B:17 and 18) did not proceed.

83. On 20 August 2018, he had an informal counselling session with the applicant (A: 20 and 87 to 92) wherein he informed him that non-compliance with instructions would lead to a formal enquiry (A:90). The session did not relate specifically to the verification of the analytes because there had been noncompliance of other tasks, eg, SOP for the bench, completing the FMQ1110, etc.
84. The instruction to verify had been initiated on the 1 August 2018.
85. He retrained him on 31 August 2018.
86. He was not aware that the applicant had tendered an explanation regarding B:17 and 18 and the charges had been withdrawn.
87. A: 36 consists of his notes to the ER manager.
88. There had been repeated insubordination from 31 August 2018. He had given reasons why he did not comply but the respondent had assisted him and extended his due dates.
89. The respondent had been in the process of accreditation and there was an upcoming audit and the target date would not have been met had the applicant not completed the verifications.
90. The previous verification in his care had been lost and hence it was imperative to do the audit. The auditors could have reported that there was non-conformance and a loss of accreditation and therefore not being able to offer tests to patients.
91. When he did not hear from him after the instructions and the assistance, he assumed that from the counselling session the applicant had understood that there would be discipline.
92. He could not agree that the applicant's core functions had been performed well.
93. The charge sheet referred to a persistent failure from 2 September 2018 to 28 October (B:1). 2 September 2019 was a Sunday. But this had all come from an instruction that emerged from the 1 August 2018. He had heard his cry for assistance on the 3 September 2018 and had given him the help on the 11 September 2018.
94. As the manager, he was aware that running the bench and doing the one additional task was "doable".
95. Two of the counselling sessions had related to sick leave and time keeping, (A: 87 to 120).
96. The other three had related to the instructions.

97. All employees who met the minimum criteria had been awarded a 1% performance bonus.
98. On re-examination, he explained that after 20 August 2018, the applicant had not submitted the analytes.
99. He pleaded guilty at the enquiry and had appealed but had not changed his plea.
100. The applicant only mentioned submission of the email at the appeal stage in January 2019.
101. He did not completed the verification of the remaining analytes.
102. The audit was to occur in October 2018. There had been no compliance with the template for verification which was intended to be part of the auditing process.
103. The applicant was the QA delegate and had been fully aware of the importance of completing the tasks.
104. The Code of Conduct applied to the applicant. (B56 to 68).
105. The matter was then stood down for the applicant and his representative to consider whether the IT principle that an email sent to oneself was received in ones email inbox.
106. An email was then sent to the respondent's representative (F) that there was no need to call an IT expert to confirm this principle and that this was correct.

#### APPLICANT'S VERSION

107. **MUKESH HARIPERSAD BAIJNATH** (MB) testified that he had initially pleaded not guilty to the charges and then had amended his plea to guilty. His union representative and Bheki, the ER Manager, had a meeting and had caucused and on his official's advice he had changed his plea.
108. The representatives had come from Gauteng and he had wanted to fast track the matter because it was costly and he wanted to save time. He had expected a lenient sanction which was the reason for amending his plea. He would have not changed his plea had he known he would have been dismissed because of it.



109. The respondent's representative did not aggravate sanction at the hearing. And no evidence had been led before the chairperson (B:16). He had no previous warnings and no previous similar misconduct record.
110. There were three sections in the lab and he had worked alone. His function had been to perform routine and urgent specimen analysis for diagnosis and prognosis of patients from various hospitals and clinics.
111. On average he handled 100 – 150 – 200 patient samples.
112. The core function of the lab manager had been to complete analytes. It was true that HR could allocate the work to him which he could not refuse to perform.
113. The failure to do complete the verifications had led to an internal document to call for an enquiry (A:12). This matter had been handled by him and thereafter on 31 August 2018, he had been provided with training by the manager and the Quality Assurance Co Ordinator, Ngubo.
114. A hearing was held in December and he was found guilty and dismissed.
115. At B:3, is HR's instruction sent on 2 September 2019 to complete one analyte to be sent through by Monday. This was done to ensure that he understood what the training was about.
116. He did not comply with this and sent him and his union official an email. He explained his challenges including the focus away from his core function (B: 4).
117. He then complied after he received the assistance (B: 9). He sent the template to himself in error (E). It may have come back to his inbox, or he may have moved it to a folder or deleted it. The time of 11:26 is a busy time in the lab and he cannot recall whether he saw it or not. He shared the computer with Mjoli on one work station and had to send patient results on as well.
118. It is true that the respondent did not receive it but HR did not come to ask him for the results.
119. He also did not complete the remaining analytes.
120. When he received HR's email of "noted" he assumed that the matter was resolved and that his explanation for failing to do the analytes had been accepted.
121. He had not been suspended from duty. The statements of his performance were untrue. He had qualified for pay progression and HR found him suitable and in some areas on the scoring card he had

exceeded requirements. He had been the quality assurance designate for the lab and during his tenure he had improved the scores from 60 to 90%.

122. There were no challenges within his relationship with HR who always followed the quality recommendations.
123. They had a good relationship and he had helped him with client satisfaction surveys.
124. The applicant had explained his health complications to the respondent.
125. He sought retrospective reinstatement.
126. On cross-examination, he confirmed that he had received the notice and understood the allegations. He had pleaded guilty because he had wanted to fast track the process given that the chairperson and the employer representative were from Johannesburg.
127. He had pleaded guilty on his union's advice. His initial plea had been not guilty.
128. At the disciplinary enquiry he had been represented by Rama from the PSA.
129. No evidence had been led at the enquiry because there had been an admission of guilt. The chairperson then said they could immediately go to mitigating and aggravating factors for the sanction.
130. The size of the Osinidisweni laboratory is a huge one with a lot of space. It is also true that it is small compared to Albert Luthuli and Mahatma laboratories.
131. There are three sections in the laboratory, chemistry, microbiology and heamatology benches. He worked alone in chemistry. Three of the five staff were allocated benches. The other two employees are roving.
132. He had a counselling session on the 20 August 2018 (A:87) on verification. He signed the minutes of the counselling session (A: 91).
133. At A: 90 it was stated that "*if continued noncompliance is observed, then this will lead to an official complaint being issued.....*" and that led to the charges as set out at A: 8.
134. He appealed the sanction on 18 January 2019 (A: 80) and the dismissal was upheld.
135. He did not comply with the verification of all the others (B:30) analytes.

136. On the 12 September 2018 at 11:26, he had completed the analyte.
137. It is true that the template required 5 dates but the programme had just added 13, 14, 15 September 2019.
138. The analyte submitted on the 12 September 2019 had not been fraudulent. HR had merely wanted to see whether he was able to perform the verification.
139. There has been no corrective action taken against him and he denied that he had been a continuous "wrong doer" whilst within the employ of the respondent.
140. On re-examination, he explained that as a result of him not rectifying his conduct he had been charged. He denied that it had been a reasonable instruction because, without any support, it could not have been completed.
141. He had faced a misconduct enquiry (B:13 and 14).
142. He denied that the verification (E) was a fraudulent document. It was a spreadsheet that had populated itself. It was a printout from a template. The date automatically changed. The dates were wrong.
143. The validation was supported by raw data that was available in the laboratory.
144. For clarity, verification was a process whereby an instrument was deemed fit for use by the laboratory using QC materials, internally or externally obtained.
145. There were other employees given verification but it had always been a team effort.

## **ANALYSIS OF THE EVIDENCE AND ARGUMENT**

146. The applicant was charged and found guilty of the following charges:

*"Charge 1: Failing to follow reasonable instruction.*

- 1.1 *It is alleged that on the 2 September 2018 you were instructed to complete one analyte and sent it to Mrs Mbalenhle Ngubo (Quality Assurance Co-Ordinator) and copy the laboratory manager and you failed to do so.*

- 1.2 On the 10 September 2018 you requested for assistance from your line manager and it was done on the 11 September and you were asked again to complete one analyte verification and send it to Mrs Mbalenhle Ngubo and send a copy to the laboratory manager but you failed to follow the reasonable instruction until 28 October 2018 when you still did not do it as requested.

*Charge 2: Failure to follow NHLS Code of Conduct*

- 2.1 It is alleged that you in your capacity as the Medical Technologist in Osindisweni Laboratory on 2 September 2018 you failed to follow the Clause 4.1, 4.2, 4.3, and 4.5 of the NHLS Code of Conduct. “

(A: 8)

147. Whilst the evidence in this matter has been lengthy, the facts themselves appear to be common cause:

- 1.1 The applicant was a medical technologist who was asked on the 1 August 2018 to perform various verifications (A:13).
- 1.2 These verifications or analytes were vital to ensure compliance in the impending audit.
- 1.3 On 8 August 2018, a follow up was requested (A:15) to which the applicant tendered an explanation (A:15).
- 1.4 Various emails went back and forth between HR and the applicant which culminated in a counselling session on 20 August 2018 (A:87 to 92). At this counselling session, it was agreed that “*Template for verification- requires retraining (Mr Baijnath says that this is a complex task and requires task team)*” (A:90).
- 1.5 The applicant then underwent this further retraining on 31 August 2018 (A:21).
- 1.6 On 2 September 2018, the applicant was sent an email from HR (A:23) wherein HR recorded that the applicant was required to perform one analyte and send it to the QAC on Monday 3 September 2018 to ensure that he understood what was required of him. Once he had completed this verification, he would be expected to complete the rest of the verifications within a two week time frame.
- 1.7 It is this email that precipitated all the charges preferred.

- 1.8 Various emails were then yet again sent between the two protagonists, with the applicant reiterating that he required assistance on the chemistry bench in order to take the time to complete the analyte. HR then complied with this request for direct intervention (A: 26) and provided the applicant with assistance on the bench.
- 1.9 On the 11 September 2018, the instruction to complete the verification for one analyte was then handed down again (A:26). The instruction read *"you will be afforded today as discussed earlier this morning one hour between 10:30-11:30 to complete one analyte for chemistry....."*
148. From this point on, the versions appear to become incongruent. The applicant was then charged with a failure to perform this one analyte and various breaches of the respondent's code of conduct and brought before an enquiry.
149. It was never disputed that the applicant, duly represented by PSA throughout these proceedings, had elected to amend his plea from not guilty to guilty, after a caucus between the official, Rama and the ER specialist, Hlatshwayo. In fact, the minutes of the enquiry record such amendment (A: 74).
150. Upon receipt of the plea of guilty, logically so, the chairperson did not hear any evidence on the issues and, correctly so, directed the parties to provide aggravating and mitigating circumstances (A: 74 to 77). The applicant testified that he tendered various factors in mitigation. The minutes do not record any aggravating facts submitted by the respondent, bar references to the respondent's code of conduct.
151. The applicant was then dismissed.
152. It was only much later after the dismissal that the respondent become aware that the applicant had indeed submitted the verification but erred in sending the email to himself. In fact, it was only in July 2019, that the respondent's witness, HR, had become aware that the applicant had completed the analyte.
153. And thus, the two apparently divergent versions become not so different after all.
154. HR, whilst he had not been at the disciplinary enquiry, conceded that from a perusal of the email (D), that the applicant had indeed complied with the instruction on the 12 September 2018. HR did attempt to make a critical evaluation of the actual results of the analyte in Exhibit D and whether they were indeed adequate. However, with respect, that wasn't the issue before me.

155. Whether the analyte was done incorrectly or not is not relevant to the case at hand. That may have been a debate within a counselling session for poor performance had the analyte been received by the respondent and the results checked.
156. In casu, the misconduct charged is one of gross insubordination, namely his failure to perform the **one** analyte discussed in the instruction of the 2 September 2018 and endorsed on the 4 September 2018 (A: 23 and 24). The other verifications do not form part of the charges preferred against the applicant.
157. The applicant appears to have followed through on the instruction. He happens to have been careless in not ensuring it was sent through to HR and QAC. It is also apparent that, given the amendment of his plea, the respondent had not been made privy of this actual compliance at the enquiry stage.
158. The applicant's evidence was that it had been suggested to him by his union official, after consultation with Hlatshwayo, that he amend his plea. There was no dispute of this evidence. In fact, the respondent's only witness explained that he had not been privy to these discussions. No other person from the respondent testified to challenge the evidence. I accept the version that he had amended his plea because he had hoped this would influence a chairperson into awarding a lesser sanction.
159. He assumed wrong.
160. And this imbroglio has caused this state of affairs before me.
161. The respondent, who had become embroiled in the amendment of the plea, perhaps with the best of intentions, and the applicant were then left in the hands of a chairperson who evaluated evidence in the form of the applicant's disciplinary records without them being placed properly before him. He obviously considered documents outside the proceedings.
162. The chairperson's summary (A:69 and 70) of the enquiry indicates that the employer only requested that the *"chairperson be guided by the NHLS disciplinary policy and NHLS Code of Conduct policy"*. The respondent did not place any other factors before the chairperson who went to *"background information.....(which) showed a similar behavioural pattern"*.
163. This information was not placed before the chairperson and it begs the answer where did he obtain such information from, did he make enquiries on the Oracle system of his own accord? Or was it placed before him outside the process? It would seem ultra vires his power to have made this investigation outside the formal process. And this is improper.



164. HR did not dispute that the applicant, prima facie, the document, appears to have complied with the instruction to complete the one analyte (whether it was performed adequately or not) and his evidence, during cross-examination, elicited the concession that had he had sight of Exhibit D, the parties would not have found themselves at this forum in this process.
165. The applicant, it is my view, has complied with the instruction and is not guilty of charge 1.
166. However, what is relevant at this stage is that the respondent had not been aware of this compliance through no fault of its own at the disciplinary enquiry stage. In fact, both parties had sought to limit the time and effort put into the enquiry and no one felt it necessary to make any further interrogation into the merits of the charge and whether there had been obedience to the instruction.
167. The applicant had also contributed to this extraordinary, peculiar situation by not disclosing his email of the 12 September 2018, which would have been an easier and simpler resolution of the matter at the enquiry.
168. I have perused the NHLS Code of Conduct, from which the second charge emanated. It calls for, inter alia, responsible conduct on the part of employees towards the respondent.
169. Clause 4.2 in particular prescribes executing one's responsibilities professionally and competently. I accept that the applicant shared a computer and that the station was busy and that there may have been many reasons why he had failed to see that the email had been sent to himself.
170. However, the applicant was also keenly aware that there was pressure placed upon him to complete the analyte and that the eyes of management were upon him. It is reasonable to have expected him to have made an extra effort to ensure that he performed, not just the task at hand, but the submission of the task, responsibly and properly. This should have entailed double checking that the email had gone through, from his sent box and that the address was correct too.
171. This would have been in compliance with his obligations prescribed in the code of conduct.
172. The applicant ought to have exercised more diligent care in his conveyance of the email to the proper people awaiting execution. It is not for the employer to follow up, particularly in these circumstances where the applicant had been warned about non-compliance. And therefore I find him guilty of a breach of the respondent's code of conduct.



173. The applicant must and will bear some of the consequences of the failure to ensure proper delivery of the email. Because whilst Exhibit D exculpates him from accountability to the charges, he was complicit in the mischief that has ensued and led all to arbitration.
174. The applicant's salary is set out in the pre-arbitration minute marked Exhibit C.
175. It is fair and equitable that the following award be made:

#### **AWARD**

176. The applicant's dismissal is unfair;
177. The respondent, NATIONAL HEALTH LABORATORY SERVICES is ordered to reinstate, MUKESH H. BAIJNATH on the same terms and conditions that governed his employment prior to his dismissal;
178. The respondent is further ordered to pay the applicant retrospective remuneration and benefits limited to five months of his monthly remuneration, in the sum of R180 537, 10;
179. The applicant is ordered to report for duty on the 1 November 2019 at the respondent's premises, being the Osindisweni Laboratory;
180. There is no order as to costs.

 APPROVED

KAREN CHARLES  
COMMISSIONER