

Polygraphs

Polygraph testing in the employment environment

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Employers are often faced with misconduct or criminal activities such as misappropriation of property or theft in its work environment, without knowing exactly where, how and by whom it is committed. It is crippling the business and the employer is at its wits-end how to find the culprits! To make things worse, you suspect that there are accomplices amongst your employees, sharing in the illegal proceeds and helping to hide the crime! What to do? Can you send all your employees for a polygraph test?

This is what happened in the case of *Amalgamated Pharmaceuticals Ltd v Grobler NO and others* (2004) 13 LC 1.11.3 where the third, fourth and fifth respondents were dismissed for misappropriation of company property. A polygraph test showed that they could be responsible for the serious stock losses suffered by the applicant. The Labour Court agreed with the reasoning of the Commissioner who found that, in practice, a polygraph does not serve to prove that someone is actually lying, for the questions are often too broad to exclude that which is neither intended nor sought. And it most definitely does not prove that someone is guilty. It is merely an indication of deception.

It has been widely accepted by the Labour Court and the CCMA in cases such as *Sosibo & others* and *CTM*(2001) 10 CCMA 2.5.2 that, polygraph testing in the workplace is highly contentious and the admissibility of its results remains moot. The sole reliance by the employer on unspecific polygraph results is insufficient to discharge the onus in terms of section 192 of the Labour Relations Act 66 of 1995 to prove that the dismissal was fair. To discharge this onus, the test of a balance of probabilities is used. To only present polygraph evidence is not enough to show that the dismissal was fair because there is no corroborating evidence.

Does that mean that an employer cannot use polygraph testing? No, it does not, however there are some strict rules relating to polygraph tests that need to be adhered to, unless the employer wants the test to be found unreliable, unfairly applied and useless in the CCMA or the Labour Court! Firstly, the employer cannot force any employee to submit to such a test. Refusal to do so does not indicate guilt and is also not necessarily grounds for dismissal. Preferably, the employer should obtain written

consent. Secondly, the employer should agree with the Polygraphists on the questions to be asked. It should not be vague, otherwise the employer will sit with answers that do not take his case any further.

Consent means informed consent. For that purpose the employee should be informed that the examinations are voluntary, the reasons for and type of questions should be explained, it should be explained that he/she has a right to have an interpreter and should he/she prefer, another person may be present during the examination, provided that person does not interfere in any way with the proceedings. Generally, employers are permitted to use the polygraph test to investigate specific incidents where employees had access to the property which is the subject of the investigation and there is reasonable suspicion that the employee was involved in the incident.

The employer must also been subjected to economic loss or injury to the employer's business like theft of company property or the employer is involved in situations such as combating dishonesty in positions of trust, or combating serious alcohol, illegal drugs or narcotics abuse or fraudulent behaviour within the company or deliberate falsification of documents and lies regarding the true identity of the people involved. Polygraph results cannot be released to any person but only to an authorised person. Generally it is the person specifically designated in writing by the employer whom requested the examination.

Polygraphists have been accepted as expert witnesses whose evidence needs to be tested for reliability. Therefore the Polygraphists should be called to testify as an expert witness. He must testify how the test was performed, his qualifications, the type of test used and the questions asked and if necessary, a medical doctor should also testify on the issue of manipulating body functions to mislead the Polygraphists, if that becomes an issue at the hearing.

For more information contact Johanette Rheeder on jrattorneys@yebo.co.za

Polygraph Testing

Provided by the Commission for Conciliation, Mediation and Arbitration (CCMA)

WHAT IS POLYGRAPH TEST

It is a test used to verify a person's truthfulness and is often called a 'Lie Detector Test.'

IS THERE ANY LAW CONTROLLING USE OF POLYGRAPH IN SOUTH AFRICA

Polygraph testing is a fairly new concept in South Africa, especially in disputes relating to employment relationships. There is no legislation at this point to control the use of the test or to protect the employee's right against the abuse of the test.

CAN ONE BE COMPELLED TO UNDERGO A POLYGRAPH TEST

It is against the Constitution of South Africa to compel a person to undergo a polygraph examination, unless she or he consents to it. The consent must be in writing.

- The individual should be informed that—
- the examinations are voluntary;
- only questions discussed prior to the examination will be used;
- he/she has a right to have an interpreter, if necessary;
- should he/she prefer, another person may be present during the examination,
- provided that person does not interfere in any way with the proceedings;

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- the examinations are voluntary;
- only questions discussed prior to the examination will be used;
- he/she has a right to have an interpreter, if necessary;
- should he/she prefer, another person may be present during the examination, provided that person does not interfere in any way with the proceedings;
- no abuse in whatever way will be allowed;
- no discrimination will be allowed;
- no threats will be allowed.

WHEN IS THE EMPLOYER PERMITTED TO USE POLYGRAPH

Generally, employers are permitted to use the polygraph to investigate specific incidents where—

- Employees had access to the property which is the subject of the investigation;
- There is a reasonable suspicion that the employee was involved in the incident;
- There has been economic loss or injury to the employer's business like theft of company property;
- The employer is combating dishonesty in positions of trust;
- The employer is combating serious alcohol, illegal drugs or narcotics abuse and fraudulent behaviour within the company;
- The employer is combating deliberate falsification of documents and lies regarding true identity of the people involved.

WHO GETS THE POLYGRAPH TEST RESULTS

Polygraph results cannot be released to any person but to an authorised person. Generally it is the person who has undergone the polygraph test (examinee), or anyone specifically designated in writing by the examinee, firm, corporation or government agency that requested the examination.

WHAT IS THE STATUS OF POLYGRAPH TEST AT CCMA

Polygraphists have been accepted as expert witnesses whose evidence needs to be tested for reliability. The duty of the commissioner is to determine the admissibility and reliability of the evidence. Polygraph test may not be interpreted as implying guilt but may be regarded as an aggravating factor especially where there is other evidence of misconduct. In other words, polygraph test results, on their own, are not a basis for a finding of guilt. It can be used only in support of other evidence.

Relevant Legislation

The Constitution of the Republic of South Africa, Chapter 2