

Where do we stand with the polygraph testing of employees?

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byDanielle Ebrahim

A trend has developed in various work environments requiring employees to agree to undergo routine polygraph testing. Polygraph testing involves the use of an instrument which detects and measures some of the physiological changes that take place in the human body when a person lies. These tests are particularly prevalent in the retail industry.

Generally, employers are permitted by their employment contracts to use the polygraph to investigate specific incidents. Examples of these are:

- 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, such as 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; or
- The employer is combating deliberate falsification of documents and lies regarding true identity of the people involved.
- Although there is no particular legislation governing the use of the test, an employer needs to be mindful of an employee's constitutional rights enshrined in section 10, 12, 14, 23 and 35 of the Bill of Rights:
 - *"Everyone has the right to have their dignity respected and protected. "*
 - *"Everyone has the right of security over one's body and the right not to be subject to medical or scientific experiments without informed consent."*
 - *"Everyone has the right to privacy, which includes the right not to have their person searched or the privacy of their communications infringed."*
 - *"Everyone has the right to fair labour practices."*
 - *Everyone has the right to fair proceedings, which include the right to remain silent and the right not to be compelled to give self-incriminating evidence."*

These rights collectively serve the purpose of ensuring that employees are protected throughout the process. The test would therefore need to be conducted with the voluntary informed written consent of the employee, confidentially and with limited persons having access to results.

In order for an employer to ensure the test complies with procedural fairness, the following guidelines, which have been developed through various judicial precedents, need to be adhered to:

The employer must make sure that its employment contracts make specific reference to the use of polygraph testing within its business, and contain an addendum where the employee can provide the written informed consent to undergoing the test;

- Employees should voluntarily submit to the testing;
- Only questions discussed prior to the examination will be used;
- No abuse will be allowed (eg assaulting an employee while conducting the test);
- No discrimination will be allowed (eg subjecting only a particular class of employees to undergo the test);
- No threats will be allowed (eg intimidating the employees with potential victimisation or dismissal should they not be willing to undergo the test); and
- The examiner should be properly registered with an accredited South African Polygraph Association.

Polygraph testing is seen to be a controversial basis for justifying decisions taken in the workplace. Most forums have therefore adopted the approach that the results from a polygraph test can be admissible evidence if they are supported by corroborating evidence.

In the context of hiring and promotions: In the case of *Sedibeng District Municipality*, it was held that reliance on polygraph test results, as the sole basis for eliminating candidates, without any supporting information is unfair.

In the context of dismissals: In *Hove/Supacubed CC 12015J 11 BALR 1172 (CCMA)*, the commissioner ruled that polygraph tests do not in themselves prove complicity in misconduct, and that the dismissal of an employee on the basis of hearsay whistleblowers and the results of polygraph testing constituted a substantively unfair dismissal.

This was confirmed in *Amalgamated Pharmaceuticals Ltd v Grobler NO and others (2004) 13 LC*, where it was held that a polygraph test is not definite proof of guilt, but merely an indication of **deception**, and the sole reliance of an employer on polygraph tests does not discharge the onus required to prove that a dismissal was fair, as contemplated in section 192 of the Labour Relations Act.

Employees may not be home free just yet, as there have been rulings on the opposite end of the spectrum. In *SA Transport & Allied Workers Union and Others*, the court upheld a contractual obligation of an employee to undergo polygraph testing, and an understanding that, should the employee fail, they would be dismissed based on the employer's operational requirements.

The court in effect agreed that the employer was contractually entitled to conduct polygraph tests on a quarterly basis, and that the employer was entitled to transfer employees from their existing post on the sole basis of the test results.

In *National Union of Mineworkers & Others v Coin Security Group (Pty) Ltd t/a Protea Coin Group*, the court confirmed it is bound by the *Khulani Fidelity Services* precedent, but on the facts found that a dismissal based on an employee failing a polygraph test is unfair.

In *Seleke v Concor*, it was held that the refusal of an employee to submit to a test contributed to the suspicion that he stole from his employer and justified his dismissal on the basis of gross insubordination.

There is a need for the enactment of legislation to properly regulate the circumstances that justify the use of polygraph testing in the workplace, and the precise procedure employers need to follow for conducting the test.

While the courts and the Bill of Rights may serve the function of safeguarding employees' rights, we still require specific legislation clearly indicating the rights of employees and the duties of an employer during and after the polygraph testing process.

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