

Why employers can't rely solely on polygraph tests for dismissals

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The reliability and relevance of polygraph testing in the employment space have been a persistent issue that is surrounded by a lot of controversies. Employers have, in many instances, found themselves in a situation where misconduct has been committed, but are unable to identify who the perpetrator of such misconduct is. In an attempt to narrow down the list of possible perpetrators, employers have often resorted to the use of polygraph testing.



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South African courts have been sceptical of the use of the polygraph tests and the results thereof where they are unsubstantiated with additional evidence or where they are the sole basis on which the employer charges an employee with misconduct. This has been a persistent problem that our courts have had to deal with. In the case of *Goldplat Recovery (Pty) Ltd v Commission for Conciliation Mediation and Arbitration & Others* (26 January 2021), the Labour Court had to deal with an issue where an employer dismissed an employee based solely on a polygraph test result.

In September 2018, the employee was dismissed after being found in possession of gold concentrate worth an approximate value of R850,000. The employer identified that the gold concentrate came from a gold processing room, which was in a restricted area. During a disciplinary hearing, the employee, who had no access to the restricted area, indicated that he had not acted alone and indicated that there was a smuggling syndicate which operated at Goldplat's premises. He, however, refused to disclose the identity of the other members of the syndicate.

In order to establish how the employee gained access to the restricted area, which enabled him to get possession of the gold concentrate, Goldplat subjected each of the employees who worked in the restricted area to a polygraph test. Mr Maziya failed the test and was subsequently charged with misconduct and ultimately dismissed. Maziya referred an unfair dismissal dispute to the CCMA where the Commissioner found his dismissal to be unfair and awarded him maximum

compensation. The Commissioner found that the evidence presented before him showed that it was not only Maziya who had access to the restricted area, security guards, a forklift driver and the shift supervisor all had access to the restricted area.

There was, therefore, no direct evidence that implicated Maziya and the assumption made by Goldplat that he was guilty by virtue of failing his polygraph test, was mere speculation. There was no evidence led by Goldplat proving that it was only Maziya who had access to the restricted area and that he was the only employee who failed the test amongst the employees who underwent a polygraph test. In addition to this, Goldplat failed to lead expert evidence to deal with the reliability and accuracy of polygraph test results and the results of Maziya's tests.

Dissatisfied with the findings, Goldplat launched an application before the Labour Court seeking to review the Commissioner's award, alleging that he committed a material error of law in evaluating the evidence before him. In dealing with the review, the Labour Court dealt with the test to be applied in review applications. The Court confirmed the test for review and found that the decisive question that needed to be dealt with was whether the Commissioner afforded Goldplat and Maziya a fair trial, considered the issues before him, and whether his decision was one that a reasonable decision maker on the same material facts would have made.

In dealing with the reliability of the polygraph tests, the Labour Court made reference to the case of *DHL Supply Chain (Pty) Ltd v De Beer No and Others (2014) (LAC)* where the Labour Appeal Court held that the mere fact that an employee fails a polygraph test is not in itself sufficient to find an employee guilty of dishonesty. The onus rests on the employer to lead expert evidence to prove the cogency and accuracy of the polygraph test.

Goldplat failed to call an expert witness and relied only on the polygraph result to establish Maziya's guilt. Goldplat also failed to make available or even present any evidence of the polygraph tests of the employees who allegedly passed.

As a consequence of considering the evidence that was placed before the Commissioner, the Labour Court upheld his findings and dismissed the review application with costs. The Labour Court found that there was more than one reasonable inference that could be drawn from the evidence that was presented before the Commissioner. Maziya was not the only person who had access to the restricted area where the gold concentrate was stored and Goldplat did not dispute that there were other employees who had access to the restricted area who were not subjected to a polygraph test.

In addition to this, Goldplat's own witness admitted that the security guards who also had access to the restricted area were untrustworthy and could have possibly been involved in the smuggling syndicate.

It is important for employers to be cautious of relying on polygraph tests when they intend to use these tests as a basis to discipline and ultimately dismiss an employee who fails the test. The sole reliance on failed polygraph tests will be insufficient to prove that an employee is guilty of misconduct or has lied. A polygraph test can only be used to corroborate any other evidence that demonstrates that an employee is guilty of misconduct.

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