

Can an Employer Dismiss an Employee Based on a Failed Polygraph Test Alone?

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INTRODUCTION

No. A failed polygraph test, on its own, is not sufficient to prove that an employee committed misconduct or to justify a dismissal. The Labour Appeal Court has held that polygraph evidence is not conclusive of guilt and that an employer relying on it must lead expert evidence of its cogency and accurate application. The employer must still prove, on a balance of probabilities, that the employee committed the misconduct, using evidence that connects the employee to it. We elaborate below.

Where there is limited direct evidence identifying the person responsible, employers may turn to polygraph testing as part of their investigation. But what happens when an employee fails the test, and the result becomes the primary, or only, evidence relied upon to justify their dismissal?

Section 192 of the Labour Relations Act 66 of 1995 (“**LRA**”) establishes the respective burdens in unfair dismissal disputes, namely that an employee must first establish the existence of the dismissal; once established, the employer must prove that it was fair.

The question in this article is not whether polygraph testing can be useful, but rather whether a failed polygraph test, standing alone, is sufficient to establish that an employee committed misconduct and that their dismissal was substantially fair.

PROOF BEYOND THE POLYGRAPH

The decision of *Goldplat Recovery (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*¹ (“**Goldplat**”) provides a useful illustration of the difficulty an employer may face where a polygraph result forms a substantial part of the case against an employee suspected of theft.

In *Goldplat*, approximately 1.5 kilograms of gold concentrate, valued at R850 000.00, was stolen and found in the possession of another employee.

During his disciplinary enquiry, the employee alleged that there was a syndicate involved in the theft but refused to provide the names of those involved. As a result, several employees who worked in or had access to the restricted area from which the gold had been taken were subjected to polygraph testing.²

The Third Respondent (“**Mr Maziya**”) was the only one of the seven employees tested who failed the test and was subsequently dismissed. Although it was alleged that a syndicate existed, there was no evidence establishing that Mr Maziya was a member of the syndicate or that he participated in the theft.³

The Second Respondent (“**the Commissioner**”) found the dismissal substantively unfair. The employer’s case relied primarily on circumstantial evidence and the failed polygraph test, but the evidence did not sufficiently connect Mr Maziya to the theft.⁴ The Labour Court upheld the Commissioner’s conclusion, finding that the evidence permitted more than one reasonable inference and that other reasonable inferences which did not implicate Mr Maziya could not be excluded.⁵ This approach was consistent with the principles set out by the Labour Appeal Court in *DHL Supply Chain (Pty) Ltd v De Beer NO and Others*⁶, which remains an important authority on the evidentiary value of polygraph testing. The Court found it unnecessary to decide whether polygraph evidence is admissible in principle, but emphasised that its respectability remains, at best, an open question and that expert evidence is required in every instance to establish its conceptual cogency and accurate application. A failed polygraph test, without sufficient supporting evidence, does not in itself establish guilt.⁷

Circumstantial evidence requires an inference to be drawn from a collection of facts. The inference relied upon must be the most probable inference arising from those facts and must amount to more than a reasonable suspicion of wrongdoing.⁸

In *Goldplat*, this evidentiary gap was significant. The employer was able to establish that a serious theft

occurred and that Mr Maziya had access to the restricted area. However, the evidence did not establish that he was responsible for the theft, and the polygraph result did not, on its own, resolve that uncertainty.

The Court also considered the manner in which the polygraph results were presented to the Commissioner. The results were merely presented without sufficient explanation as to how they had been reached, and the employer did not provide expert evidence to establish the accuracy of the polygraph process.⁹

SUSPICION IS NOT PROOF

The difficulty with relying exclusively on polygraph evidence is that it can potentially turn an investigative tool into the determination of guilt itself.

A failed polygraph may strengthen an employer's suspicion; however, the employer must still be able to show that the evidence actually connects the employee to the misconduct.

This was an important consideration in *DHL*. The Court noted that an innocent employee in the position of the two dismissed employees could reasonably be expected to do no more than deny guilt and express ignorance as to how or why the losses occurred.¹⁰ The absence of an explanation for a loss should therefore not, on its own, be treated as evidence that the employee was responsible.

The Court raised concerns regarding the absence of expert evidence establishing the cogency of the polygraph and the technical integrity of the process. It cautioned that the mere say-so of the operator was unlikely to qualify as expert evidence regarding the validity of the underlying concept, given an obvious lack of independence and of appropriate credentials.¹¹

A polygraph result is therefore not self-proving. The mere statement that an employee "failed the polygraph" does not, without more, constitute proof that the employee committed the misconduct.

BUILDING THE EVIDENTIARY CASE

For an employer to discharge its burden of proving that the dismissal was fair, the polygraph result should form part of a broader evidentiary case rather than being treated as conclusive proof of guilt.¹²

The employer should be able to show, through evidence as a whole, how the employee was connected to the misconduct.

Where reliance is placed on a polygraph, the employer should also be able to properly explain the test and the result, including the basis upon which the result was reached and, where necessary, evidence regarding the reliability and application of the process.

Ultimately, the question is whether the totality of the evidence establishes, on a balance of probabilities, that the employee committed the misconduct.

CONCLUSION

A failed polygraph may raise suspicion, but it does not, on its own, establish guilt. An employer must still provide evidence that connects the employee to the misconduct and ultimately discharge its burden of proving the dismissal was fair.

The polygraph may form part of the case, but it should never become the case itself.

Please note: Each matter must be dealt with on a case-by-case basis, and you should consult an attorney before taking any legal action.

¹ [2021] ZALCJHB 48.

² Ibid at paras 3.1 to 3.3.

³ Ibid at paras 3.4 to 3.8 and 4.2.

⁴ Ibid at paras 4.2 to 4.5 and 16.

⁵ Ibid at paras 12 to 13.

⁶ [2014] ZALAC 15.

⁷ Ibid at paras 9, 12 and 29.

⁸ Ibid at para 9 and 18. Note 1 above at para 4.3.

⁹ Ibid at para 26. Note 1 above at paras 9 and 11.

¹⁰ Ibid at paras 14 and 15. Note 1 above at para 15.

¹¹ Ibid at paras 26 and 31. Note 1 above at paras 9 and 11.

¹² Note 6 above at paras 29 to 31.



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