

## **UNDER WHAT CIRCUMSTANCES A POLYGRAPH TEST MAY BE USED FOR DISCIPLINING EMPLOYEES**

### **Newsletter**

What do you as an employer do when you have a suspicion that an employee has engaged in dishonest conduct, but simply have no physical evidence or eye witnesses? Can you oblige the offending employee to submit to a polygraph test, and can you rely on same to prove guilt at the subsequent disciplinary proceedings?

In order to answer the above question, it must be noted that this is a relevant new concept in South African law and furthermore, there is no legislation dealing with or regulating polygraph testing in South Africa.

If there is no legislation or otherwise regulating the use of polygraphs and their admissibility, employers then need to be guided by the opinions of medical practitioners and also the decisions of our courts.

It is noted that the Health Professions Council of South Africa (HPCSA) has stated that according to studies, polygraph tests are not reliable or suitable for the workplace as employees are able to deceive the test. Strangely enough, however, our courts appear to hold a diametrically opposed view with regards to the use of polygraph tests.

In the matter of **DHL Supply Chain SA (Pty) Ltd v De Beer NO & Others (2007)** it was held that when proving guilt, a polygraph test would be purely circumstantial evidence. What this means is that if employers intend to rely on the polygraph test as evidence, it needs to be supported by other evidence and surrounding

circumstances in order to tip the proverbial balance in the employer's favour and therefore cannot stand on its own as evidence of guilt.

It is noted that a polygraph test should only be conducted when there is a reasonable suspicion supported by other factors that an employee has been involved in untoward conduct and furthermore, a polygraph may only be conducted in circumstances where an employee has consented to same.

Taking into account the above, employers are advised that they would do well to heed the warnings of the labour court and follow the aforementioned guidelines when relying on polygraph evidence lest they find themselves at the wrong end of a CCMA award which may have serious financial implications for the employer.

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