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## DEVELOPMENT AND LABOUR MONOGRAPH SERIES

### EMPLOYEE POLYGRAPH TESTING IN THE SOUTH AFRICAN WORKPLACE

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&  
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# THE INSTITUTE OF DEVELOPMENT AND LABOUR LAW

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# **Employee Polygraph Testing in the South African Workplace**

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## **Editorial Abstract**

Since the mid-1990s, South Africa's industry has experienced extensive use of polygraph testing and the trend continues to grow, despite the ongoing debates about the polygraph's accuracy. Its use in private employment is not regulated and hence an employer can require its employees to undergo testing at any time for any purpose. Employees are disciplined and/or dismissed because they fail an examination or simply refuse to take one, while job applicants are not employed. Many employers use employment contracts which contain a polygraph clause. Test results are accepted as evidence in labour disputes. The law also permits polygraph testing in some parts of the public sector.

Although polygraph examinations are extensively used in the private and public sectors, the subject matter does not get sufficient attention. This monograph will first examine the theoretical and contextual setting of polygraph testing in the employment context. We then look at the situation in South Africa in terms of its current employment law before dealing with the legitimacy of polygraph testing in an international labour law context. The ILO states explicitly that polygraph testing should not be used under any circumstances. We also consider the United States of America which experienced a similar situation in the 1980s, with about two million tests administered on employees every year. Finally, the Federal Republic of Germany has always demonstrated a general rejection of polygraph testing, and there is no known use in employment. The approaches of these two countries could be instructive in finding solutions to South Africa's problems.

## **Key words**

Polygraph testing, accuracy, reliability, employee screening, privacy and dignity, labour law, ILO standards, unfair discrimination, misconduct, substantive fairness, employee data protection, United States of America, Germany, South Africa, Employment Equity Act

# Employee Polygraph Testing in the South African Workplace

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## 1. Introduction

South African companies are increasingly making use of the polygraph in pre-employment screening of job applicants, periodic vetting of current employees, and specific investigations into misconduct or crime in the workplace. Testing is administered in various sectors, in small and large companies. Apparently, more than 1000 companies apply it.<sup>1</sup> Banks, mining companies, security companies, motor manufactures, jewellers, transport companies, courier services, hotels, pharmaceutical companies and casinos employ polygraph testing on a frequent basis because they feel particularly at risk and experience significant losses due to crime.<sup>2</sup> Employers which use polygraph testing include companies such as First National Bank, ABSA, Standard Bank, C.N.A., Holiday Inn, Mount Nelson, Solly Kramer, Fidelity Cash Management Services, Spur, Sun City, Metro Rail, Pick 'n Pay, Spoornet, SAA, Rantanga Junction, Game, Clover SA, Makro SA, Distell, Siemens, De Beers, SA Post Office, Amalgamated Pharmaceuticals Ltd, and Morkels Stores.<sup>3</sup> Numerous companies use employment contracts which contain a polygraph clause: The employee agrees to undergo an examination if the employer so requires.<sup>4</sup>

Employees are tested mainly in connection with ongoing investigations into unresolved incidents or misconduct of employees in the course of employment. Polygraph testing has also become an important part of the selection procedure as companies seek to protect their property and therefore hunt for honest employees. In this context, the test is used to examine a person's character and personality, to verify information disclosed in a curriculum vitae or in an interview, in order to identify potential risks. It is evident that a company will not employ an applicant who fails or refuses to submit to an examination. Some companies have introduced periodic polygraph vetting of their staff to prevent potential crime or/and to establish an employee's general honesty or dishonesty and therefore promote honesty and deter dishonesty. If an employee fails the test, he/she is usually dismissed. Refusal to submit to the test causes suspicion of the employee. Such an employee is therefore also likely to be dismissed because suspicion is seen to be counter-productive in the employment relationship, which requires trust.

Employers frequently submit polygraph results in dismissal disputes where it is admissible evidence. On the other hand, dismissed employees seldom submit it to show that they are not guilty of misconduct. The current South African employment law does not provide sufficient protection from polygraph testing. There is no explicit provision on its use in the private sector. Chapter II of the Employment Equity Act 55 of 1998 (EEA) restricts employee testing. Section 8 (psychological testing) is particularly relevant in terms of polygraph testing. The law explicitly allows such examinations in some parts of the public employment.

In this monograph, we review the current experience of polygraph testing in the South African workplace. We start by looking at the theoretical and contextual setting and then proceed to examine practice in the South African workplace, in particular the response by the Commission for Conciliation, Mediation and Arbitration (CCMA) and bargaining councils. We also examine the comparative position of the International Labour Organisation (ILO)

standards, the United States of America (USA) and the Federal Republic of Germany. Finally, we draw some conclusions; in particular identify the need to institute an effective regulatory framework to enhance the protection of employees.

## **2. Theoretical and contextual setting of employee polygraph testing**

If an employee is disciplined or dismissed based on the outcome of a polygraph test, the test should be accurate to some degree. Expert evidence, which lacks accuracy, does not assist the court. Most of the research has been conducted on polygraph evidence submitted in criminal cases, which is helpful and sufficient only to a certain extent in the employment context.

Polygraph testing is based on a weak theory, and its accuracy is overestimated. The existing empirical studies cannot show if the test is accurate and reliable, especially when used in the employment environment. On the other hand, polygraph examiners who testified in proceedings before the CCMA submitted accuracy rates of more than 90 per cent, sometimes even 100 per cent.<sup>5</sup>

### **2.1 Test administration and underlying theory**

The instruments used for polygraph testing are an ordinary blood pressure cuff, called the cardiograph, two electrodes attached to two fingertips, known as the galvanograph, and finally two pneumograph tubes placed around the abdomen and the chest, which is the pneumograph.<sup>6</sup> The blood pressure cuff measures the blood pressure and the heart rate while the two pneumograph tubes measure changes in respiration. Women usually show more movement in the chest, men in the stomach. The two electrodes, so-called galvanic skin response plates, are attached to the fingertips in order to determine variations in the electro-dermal response or electrical conductance of the palms' skin surface caused by sweating.<sup>7</sup> Computerised polygraph systems such as the Lafayette System are used. The physiological responses are converted to digital form and supply the computer. Software is used to process and analyse the data.

During the test, the examinee is asked different types of questions, both relevant and not relevant, while attached to the instruments. The theory underlying polygraph testing suggests that all three physiological channels respond and show changes if the examinee is concerned about a specific question. When the subject lies, he/she fears detection. The instruments will therefore measure an increase in blood pressure, an accelerated pulse rate, a higher electrical conductance at the skin surface, and suppressed or hard breathing. A psychological or physical stimulation causes involuntary and uncontrollable physiological responses generated in the autonomic nervous system.<sup>8</sup> The polygraph instruments record merely the changes in bodily responses; they do not measure deception or truth directly. The examiner draws a conclusion from the responses as to whether the subject has answered to the relevant test questions truthfully or not. The responses are used as indirect indicators of deception.

Polygraph testing requires that the examinee is aware that he/she is lying in order to be concerned about the relevant test questions. The examinee must understand the unlawfulness of his/her conduct, which he/she is trying to hide at the examination. This is the reason why minors, mentally ill people and drug addicts are not suitable. However, not every person realises that he/she has committed a crime. Proper test questions are necessary to ensure that the examinee fully understands the content of the question.

A pre-test interview is conducted to discuss the test questions with the examinee and to determine the examinee's suitability for testing because not every person is suitable to undergo a polygraph examination.<sup>9</sup> There are a number of factors which can reduce accuracy. The examiner must therefore determine the examinee's general mental and physical condition prior to the test. In this regard, the examinee is asked, for instance, about any heart diseases, low or high blood pressure, breathing abnormalities, psychiatric treatment, medication, and whether the examinee slept in the last 24 hours. During the interview, the examiner must also find out whether the examinee is under the influence of alcohol or drugs. Smoking apparently reduces the sweating of palms.

The examiner also asks about the examinee's previous jobs, why he/she has left the previous job or about his/her current financial situation. A person is attached to the polygraph instruments in order to find out whether he/she is telling the truth or not. Therefore, it seems that in the pre-test interview the examiner trusts the examinee to tell the truth. But, if the examinee is intending to lie during the polygraph examination, why would he/she tell the truth in the pre-test interview?

## **2.2 Weaknesses of polygraph testing**

Testing must be applicable in identical ways in various situations and to different people and therefore, it must be reliable, valid, standardised, and objective. To illustrate the problem in terms of polygraph testing, examinees and examiners can be either 'calm or nervous, alert or sleepy, relaxed or under time pressure, male or female, from the same or different cultural backgrounds, in the laboratory or in the field'.<sup>10</sup> Two independent examiners, each conducting a polygraph test on one examinee about one particular issue, must come to the same conclusion. In other words, all examinees must be assessed equally and fairly. Otherwise, the testing can amount to unfair discrimination.

First, there are not many studies on the reliability of polygraph testing.<sup>11</sup> However, a test must be reliable in order to be valid. The concept of reliability requires that the test results are consistent and reproducible in terms of the evaluation of different cases or different examiners scoring the same case.<sup>12</sup>

Secondly, polygraph testing lacks validity. Validity signifies accuracy and requires 'the presence of a theory of how and why the test works' and knowledge about the influencing factors so that the test will also work with examinees and situations that have not been tested.<sup>13</sup> A polygraph examiner must therefore be able to say precisely when a person is lying or not, by merely evaluating the bodily responses. However, the theoretical basis of polygraph testing has inherent limitations:

‘There is only limited correspondence between the physiological responses measured by the polygraph and the attendant psychological brain states believed to be associated with deception – in particular, that responses typically taken as indicating deception can have other causes’.<sup>14</sup>

In other words, there is no specific lie response, no absolute connection between a specific physiological response and an emotional state which can be associated solely with deception.<sup>15</sup> The polygraph instruments can only record physiological changes, showing that a person responds more to one type of question than the other. A polygraph cannot provide reasons for the physiological responses which may include fear of being caught in a lie, fear of being unjustly accused of lying, fear of losing one’s job, embarrassment or anger at being tested, surprise, noise or the pain of the pressure of the cardio cuff. Polygraph testing ‘cannot be used to determine why a person responds differentially to certain questions’.<sup>16</sup> Individuals also react differently ‘to various kind of stress, and even to identical stress. To some people, breathing may be the most sensitive indicator of emotion, while for others it may be blood pressure’.<sup>17</sup> Studies do not show that cardiovascular and electro-dermal activities are constant across examinees. Research has also indicated that subjects of various ethnic groups respond differently to stress.<sup>18</sup>

Third, polygraph testing is subjective and not standardised. Yet, a standardised procedure is essential so that the test can be applied equally to any situation. All examinees must undergo the same experience. A standardised procedure also allows comparison between the different examinations. Objectivity is the other essential part of a test. It requires that administration, scoring, and interpretation ‘are independent of the subjective judgment of the particular examiner’.<sup>19</sup> Furthermore, polygraph testing requires interaction between the examiner and the examinee in the pre-test interview in order to find suitable test questions, which limits the impact of computerisation on increasing the accuracy of testing. In this regard, studies have shown that a computerised evaluation is not much more accurate than an ordinary numerical evaluation.<sup>20</sup> Even a computerised interpretation is not completely objective, since the computer input requires data that is collected by the examiner. The computer also cannot detect physical countermeasures.

Although the problem lies mainly in the weak theoretical foundation, the level of accuracy of a particular polygraph examination varies according to the skill, training and experience of the examiner, in particular his/her competence to determine whether the examinee is suitable to undergo the test, to create an appropriate test environment, to use the right question format, to ask appropriate questions and to evaluate the charts correctly. In South Africa, there is a considerable lack of qualified and experienced polygraph examiners. Apparently, only 20 per cent of examiners have the necessary qualifications.<sup>21</sup> Training and test administration are not standardised. Polygraph examiners are not registered with a statutory supervising body. There are three organisations: the Polygraph Association of South Africa (PASA), the South African Professional Polygraph Association, and the Polygraph and Voice Stress Association of South Africa, which have different standards regarding examiner training and test administration. The number of examiners increases at least 50 per cent every year according to PASA,

which indicates that the number of administered polygraph tests in South Africa is also increasing.<sup>22</sup>

### **2.3 Polygraph questioning formats**

In terms of polygraph testing, different question formats exist, which vary regarding their theory, test administration and validity. We shall now briefly consider the main formats, namely the Relevant-Irrelevant-Test (RIT), the Control Question Test (CQT) and the Guilty Knowledge Test (GKT).<sup>23</sup> The selection of a specific technique depends on the subject matter under investigation, whether the issue is specific, for instance, investigation of theft in the workplace, or of a general scope, as in pre-employment and employment screening.

Although the least accurate and rarely used in criminal investigations, the RIT is applied particularly in the working environment. If the RIT is used to examine a specific incident, the relevant questions are related to the crime or misconduct under investigation, while the irrelevant questions are neutral, referring to 'innocuous issues unlikely to be of much concern to anyone'.<sup>24</sup> Irrelevant questions may include: 'is today Monday?' or 'are you sitting down?' For screening purposes, the RIT is structured to be event-free in order to determine the general behavioural characteristics and tendencies of a current employee or a job applicant. Questions can be about different types of crimes or misconduct such as theft from previous employers, use of drugs or abuse of alcohol, leakage of confidential information, and lying on the job application form. It is assumed that the question that causes the largest response indicates the employee's tendency to commit a certain crime or misconduct.<sup>25</sup> The RIT is based on the 'naive and transparent' theory that a larger response to a relevant question indicates deception.<sup>26</sup> However, strong reactions to the relevant questions can be caused by reasons other than fear of deception. More importantly, the irrelevant test questions do not cause any emotional concern and therefore do not provide proper "control" for the psychological impact of being asked the relevant question'.<sup>27</sup> The RIT is also not standardised and has a weak scientific foundation. Existing research shows a very high rate of incorrect classification of the truthful suspects because they were nervous about being accused of a crime.<sup>28</sup>

The next format, the CQT, is used for both specific and screening purposes. There are a number of modified question formats of the CQT such as the Modified General Questions Test (MGQT)<sup>29</sup> and the Zone Comparison Test (ZCT).<sup>30</sup> In terms of the CQT, the different types of relevant, control or comparison questions and irrelevant questions are composed. Relevant questions relate to a specific event or crime under investigation. Control questions are very general and refer to non-specific criminal behaviour in the examinee's past, unknown to the examiner, which is similar to the relevant issue. It is assumed that most people have taken something that did not belong to them at some stage or have lied about something but do not want to admit to it. Control questions are designed to cause doubt about the truthfulness of the answer, so the innocent examinee is usually more concerned about these questions because he/she is lying on the control questions but is truthful on the relevant questions.<sup>31</sup> An example of a typical CQT is the following: 1. Irrelevant question: Is today Monday? 2. Relevant question: Have you stolen the money from A? 3. Control question: Before

today, did you ever take something that did not belong to you? 4. Relevant question: Did you take the money out of the safe? 5. Control question: Did you ever tell someone a lie?

The CQT is not based on plausible assumptions. The control questions show a lack of equivalence to the relevant questions and therefore provide no control in the scientific sense. It would in fact require the existence of two similar crimes, both containing a serious accusation, with one having a known truthful response, so that the case at issue could be compared with it.<sup>32</sup> Field studies indicate a high detection rate of lying examinees but they also show a high rate of false incrimination of innocent suspects. Most examinees are more concerned about the relevant questions as they relate to a particular serious crime, rather than about the general, non-specific control questions.<sup>33</sup> It is also possible that a 'control question may have special significance to an examinee' not known to the examiner.<sup>34</sup>

Finally, we consider the GKT which can only be used for investigations into specific misconduct. Several series or questions with one relevant, crime-related alternative and several neutral alternatives are composed. The theory claims that guilty knowledge implies a consistently greater response to the crime-related alternative while innocent subjects show nearly the same response to all alternatives.<sup>35</sup> Typical GKT questions sequences may be, for instance: Where did you kill A? Did you kill A in the a) garden, b) kitchen, c) lounge, or d) bedroom? Depending on the number of alternatives, a more accurate estimate of false positive errors can be given prior to the test provided that there is no leakage of relevant case details. The estimate of false negative errors is, however, much more complicated as the guilty suspect has to remember the relevant knowledge facts.<sup>36</sup> The GKT requires that the person who designs the test questions knows the correct response to each item, but it must be unknown to all examinees except of course the perpetrator. The GKT is based on a more plausible theory. However, it is difficult to formulate proper test questions due to the problem of identifying the relevant features of an event which, on the other hand, the guilty examinee must also remember. It is furthermore not easy, although it is essential, to prevent leakage of the relevant aspects of the crime to the innocent suspects.<sup>37</sup> Leakage leads to false positive errors, meaning the innocent examinee responds more to the relevant items. For the above-mentioned reasons it is, however, more difficult to conduct a GKT than a CQT, which extremely limits its field applicability. In fact it is believed that the GKT can be applied in only 13 to 18 per cent of all cases.<sup>38</sup> Hence, there is however only minimal field research on the GKT. These studies indicate a low detection rate of guilty suspects of only 47 per cent which means no accuracy in the scientific sense.<sup>39</sup>

## **2.4 Employee polygraph testing**

Polygraph testing is administered for different purposes in the workplace such as for employment and pre-employment or pre-clearance screening as well as for investigating specific crime or misconduct. The test provides information that is not available from other sources such as interviews or curriculum vitae. The interviewer then focuses on certain issues in post-test questioning. Apparently, job applicants are more honest in the application process if they face a polygraph test, which is an indication of its usefulness

but not its accuracy. The polygraph testing for screening purposes is a multiple-issue examination to reveal any undetected crime or misconduct. Issues such as drug use, job satisfaction and commitment might be investigated. On account of there being no specific event being investigated of which the examiner knows, the relevant questions must therefore be more general in scope. Relevant questions may be, for instance: 'Are you relatively satisfied with this job now?', 'Do you intend to stay with this employer?' or 'Is there a particular person at the store that is responsible for damaging merchandise?' It is further assumed that questions about specific described events cause more intensive physiological reaction than general formulated questions. In terms of the latter, the psychological difference between relevant and control questions are smaller.<sup>40</sup> A less intensive reaction, however, also implies a lower accuracy.

Pre-employment screening becomes even more complicated because polygraph testing involves 'inferences about future behavior on the basis of information about past behavior' in order to reveal any dishonest behavioural tendencies of job applicants.<sup>41</sup> Further relevant questions may be, for instance 'Did you tell the complete truth on your job application?', 'Have you withheld information from your job application?', 'Have you ever been fired from a job?', 'Are you seeking a permanent position with this company?', 'Did you graduate from college?', 'In the last five years did you steal any money from previous employers?', 'In the last five years did you take part in or commit any serious crime?' or 'Have you ever had your driver's licence suspended or revoked?'

Only certain question formats can be used in the employment context, particularly for employee screening, but these formats lack standardisation and objectivity. The techniques also show a high rate of wrong classifications of innocent examinees, which clearly speaks against their use as incriminating evidence. Yet employers use the results to show misconduct. In terms of event-free screening, typically applied in the employment context, polygraph testing has very little accuracy. It cannot predict future tendencies, assess attitudes, or determine suitability. It can only provide some information about previous behaviour, which is quite different in kind. The problem with the CQT in this context lies in the composition of adequate control questions. In order to detect general dishonesty 'enhanced physiological reactions to the typical control question are now taken as an indication of deception ... but to make such inferences, one must compare the responses to those new relevant questions with the responses to equivalent control questions'.<sup>42</sup> These new control or comparison questions must however relate to other hypothetical crimes of similar importance.

In employment, most polygraph tests are in fact blanket examinations. Blanket testing means that in order to investigate a specific incident in the workplace, the employer requests all employees who had access to the property to undergo a polygraph test. There is, however, no need for polygraph testing, if the existing evidence would be sufficient. The administration of the test is an attempt to obtain some evidence, preferably in the form of a confession. The polygraph test results provide additional information, in addition to the fact that the employee had access, and numerous CCMA cases show that the results particularly help to tip the balance of probabilities in favour of the employer.

Particularly in the employment context, the polygraph's accuracy is confounded habitually with utility. There is no doubt that polygraph tests have a great utility in criminal and civil cases, but this leads to people overestimating their accuracy. Polygraph testing can have a deterrent effect in the employment context. For instance, dishonest people are likely not to apply for a position that requires them to undergo a polygraph test. Current employees who fear the adverse consequences of a negative test outcome will choose to resign rather than submit to an examination. The deterrent effect only relates to utility. The same can be said for the use of polygraph to elicit confessions from the employee. Both cases do not contribute to the validity of the test and therefore cannot be used to assess the accuracy of polygraph testing as they merely relate to 'people's beliefs about validity'.<sup>43</sup>

Accuracy and measuring accuracy can vary between sectors of the population, such as criminal suspects, truthful examinees, employees or scientists, and situations such as criminal investigations, employment or pre-employment screening.<sup>44</sup> Therefore, each population sector needs to be researched. However, there is relatively little research on the validity of polygraphs in the context of employment and pre-employment screening. Most of the studies involve criminal cases and therefore event-specific tests. The screening situation is however quite different to that of crime-specific investigations, so the research results of the latter cannot be used to determine the validity of the former. Polygraph screening also appears to be less accurate than specific-event testing. The accuracy rate varies according to the purpose of a particular test because the criteria for assessing validity are different in each case. In terms of specific investigations, the relevant issue is easy to define. If the polygraph is used for employment screening there is usually a large variety of events that can be relevant to the test. Pre-employment screening is conducted in order to predict future tendencies of an employee. In order to assess the polygraph's accuracy, one needs to include cases where the applicants passed the test, but later during the course of employment they committed a crime or misconduct, and vice versa. However, job applicants who failed the test and appear to show negative tendencies, are not employed. Thus pre-employment screening has the problem of sampling bias and it also lacks an independent criterion of truth. The decision of the employer does not verify the test outcome; it is merely the consequence of it.

It becomes evident that the administration of adequate field studies is highly complicated. The empirical research on employment screening is indeed very weak. Most of the studies refer to event-specific examinations and in terms of polygraph screening, the available research consists mainly of laboratory experiments using the RIT format and a small number of examinees. However, laboratory studies typically show a narrow range of issues as a matter of methodology although a wide range of issues actually characterises employment screening.<sup>45</sup> Hence, they do not have much external validity.

The polygraph's inherent limitations need to be appreciated, and it should not be used in the workplace. The test outcome should not be admissible evidence in court and, in particular, in CCMA proceedings.

### 3. The South African context

South Africa's private sector has been using the polygraph since 1978 and the government since 1986.<sup>46</sup> Approximately 20,000 tests were conducted in 2000.<sup>47</sup> More recent information was not available at the time of writing but it is very likely that the number of tests has increased considerably since 2000. According to a statement of PASA in 2004, pre-employment polygraph screening is on the increase.<sup>48</sup> On the other hand, South Africa does not have explicit regulations to confine or regulate the use of polygraph testing in the private sector and nothing is done to ensure that, at least, qualified examiners conduct the examinations. In fact, polygraph testing has become more important in crime investigation and prevention in the workplace due to increasing economic crime. Although an employee is not generally obliged to undergo a polygraph examination, the majority of employees submit without hesitation to the test, probably because of fear of losing their jobs. Only a few - according to PASA, less than 0.5 per cent - refuse.<sup>49</sup> Most examinees reportedly confess after failing the test.

With regard to public employment, members of the South African Police Service (SAPS), Scorpions, Defence Force, and Intelligence Service are polygraph tested during recruitment and there is also periodic screening. In the Police Service, it is said that polygraph testing eliminates 95 per cent of unsuitable applicants. From 1962 to 1991, the pre-employment polygraph screening of police applicants in South Africa has increased from 16 to 75 per cent, as 'officer candidates must possess the highest ethical and moral standards because of the burden of trust placed upon them'.<sup>50</sup>

A polygraph industry is well established. Numerous companies offer investigation services; verification of, for instance, academic qualifications, driver licence, criminal record, or employment history for the pre-employment selection procedure; and polygraph testing to their customers. A number of companies specialise in polygraph investigations.<sup>51</sup>

#### 3.1 Admissibility of polygraph evidence

Polygraph evidence is admissible in labour disputes and here it is mostly used as incriminatory evidence, namely submitted by the employer to show that the dismissal for misconduct was fair, despite the high misclassification rate of innocent examinees. It is interesting to note that polygraph charts are not admissible evidence in criminal and civil proceedings. Testing is used only for police investigations.

While employers increasingly rely on it, dismissed employees very seldom submit polygraph evidence to show that they are not guilty of the alleged misconduct. Only a few cases exist: In *Simani v Coca-Cola Furtune*, the CCMA rejected polygraph evidence because it was not consistent with other submitted evidence, whereas in *NUFBWSAW v Stellenbosch Farmers' Winery*, it was accepted to confirm that the employee was not involved in the misconduct.<sup>52</sup>

Regarding the test results, the CCMA has held that the 'admissibility of the evidence is not at all in question. What is in question ... is the evidential weight to be attached to such evidence'.<sup>53</sup> However, can a test result derived

from an unscientific method be admissible evidence? Is the polygraph examiner in fact an expert witness? Does the polygraph examiner give his/her opinion on an ultimate issue and, if so, is the opinion admissible? These are some of the questions that inevitably arise.

The existing scientific research on polygraph testing cannot show how accurately the technique can prove the veracity of the examinee's statement. With regard to screening, no adequate study has been conducted. Therefore, it is rather doubtful whether polygraph evidence can be relevant and therefore admissible. In some cases the CCMA has held that the polygraph chart might indicate that the employee lied at the examination, but still did not provide sufficient information on the misconduct under investigation. In *Sosibo v CTM*, the CCMA found that polygraph results did not give conclusive evidence but merely indicated deception.<sup>54</sup> The test did not provide detailed information on the misconduct in issue, as the relevant test questions were too general, and sole reliance on test results was not sufficient to prove misconduct. In *Steen v Wetherlys*, the CCMA also found that polygraph evidence was inconclusive and could be taken only as a sign that the examinee 'was in a heightened state of general arousal.'<sup>55</sup> In *NUMSA obo Masuku v Marthinusen & Coutts* it was held that the polygraph test was not in itself sufficient to prove guilt, but was admissible as expert evidence. The polygraph test was supposed to prove only that the employee had lied, but no questions were asked about the damage to the car. No other evidence supported the test results.<sup>56</sup> In *SACCAWU obo Sydney Fongo v Pick 'n Pay*, the evidence was seen as irrelevant because it proved dishonesty rather than gross negligence.<sup>57</sup>

When dealing with the relevance of evidence, the court must also consider whether the admission of such evidence causes a proliferation or multiplicity of collateral issues, which would be of little probative value with regard to the relevant main issue, namely, whether the employee has committed the misconduct. However:

'[once these] subsidiary issues have been determined the court merely ends up with the following fairly useless result: the opinion of someone else that the witness concerned is truthful or untruthful according to a test which has as yet not received universal or broad acceptance in the scientific world. There is a real risk that the drawn-out and time-consuming investigation of collateral issues would not justify the final result.'<sup>58</sup>

The admission of polygraph evidence in arbitration proceedings is actually contradictory to the purpose of arbitration proceedings, which is to resolve disputes in a quick, cheap and informal manner in terms of section 138(1) of the Labour Relations Act 66 of 1995 (LRA).

Expert evidence must be relevant in order to be admissible. It is relevant if the opinion assists the court and it is not relevant if the court is in the position to decide without the opinion.<sup>59</sup> It therefore requires a subject upon which the court is either unable to form an opinion without assistance, or the court could come to some sort of independent conclusion, but the help of an expert would be useful.<sup>60</sup> The CCMA has held that a polygraph examiner's statement was useful and therefore relevant expert evidence.<sup>61</sup> An expert possesses

acquired special skill, training or experience on a particular subject and hence in this regard is better qualified to form an opinion than the court.<sup>62</sup>

There are divergent decisions as to whether a polygraph examiner is sufficiently qualified and experienced to give an opinion on the subject to assist the court. The Industrial Court required in *Mahlangu* (1985), South Africa's first labour law judgment on lie-detection evidence, a qualified and registered psychologist to administer the test. Otherwise, such testing would be 'unscientific, unethical, invalid and illegal'.<sup>63</sup> Unfortunately, no polygraph was used in this particular case and therefore it had little impact on following decisions. The judgment, however, deals with lie detector devices in general and therefore also applies to the polygraph. The CCMA is principally satisfied with a qualified polygraph examiner.<sup>64</sup> However, as mentioned earlier on, most examiners do not have psychological training. Polygraph training is also not standardised in South Africa and examiners are not registered with a statutory body. An unknown number of unqualified examiners administer polygraph tests. In respect of the method's theoretical foundation, the court found in *Mahlangu* that 'physical changes may also be brought about by other mental and emotional states' and therefore it had:

'the greatest doubt as to whether tests such as these can in fact detect whether the subject is telling the truth. At the very least, a trained psychologist would be needed to attempt to evaluate these mental and emotional responses and determine the cause of the alleged physical responses.'<sup>65</sup>

The Industrial Court therefore rejected the evidence.

Polygraph examiners were also found to be insufficiently qualified in a few CCMA cases. In *Sosibo & others v CTM*, the CCMA held that although the examiner was 'undoubtedly an expert in polygraph equipment ... a scientific or medical expert has to lead evidence that any conscious effort at deception by a rational individual causes involuntary and uncontrollable physiological responses'.<sup>66</sup> Similarly, the CCMA found in *Steen v Wetherlys* that if the examiner did not have the required medical or psychological qualifications, he/she was not in fact an expert witness.<sup>67</sup> Employees often do not challenge the examiner's qualifications.<sup>68</sup> It was questioned in *PETUSA*, in particular, whether a training period of few weeks was adequate, but the CCMA accepted the examiner's evidence.<sup>69</sup>

Although the law of evidence does not require a certain degree of accuracy, expertise should be sufficiently recognised as reliable and valid by others competent of evaluating its theoretical and empirical foundations, in order to be of assistance to the court. The Psychometric Committee of the Professional Board for Psychology of the Health Professional Council of South Africa (HPCSA), which is the competent authority for classifying psychological tests, does not find polygraph testing reliable and valid.<sup>70</sup>

There is no consistent approach by the dispute resolution bodies regarding the polygraph's scientific reliability and validity. The *Mahlangu* judgment, which concluded that lie-detection testing was unscientific and invalid, had little impact on subsequent proceedings in the CCMA. In a number of cases, the CCMA held that *Mahlangu* could be disregarded because of the different

equipment used, and it was also stated that the technology might have changed since then.<sup>71</sup> Yet, as discussed above, *Mahlangu* applies to all types of lie-detection devices. Further, it is the theoretical foundation of polygraph testing which causes problems.

In a few cases, the CCMA has followed the judgment in *Mahlangu* and held that polygraph evidence was inadmissible, inconclusive and unreliable evidence.<sup>72</sup> In *Singh, Dhumal v First National Bank*, the employee was charged with theft, dishonesty and defalcation, and was dismissed after failing a polygraph test. The examiner was heard but was unable to establish the accuracy and reliability of polygraph testing. The CCMA referred to *Mahlangu* and stated that polygraph testing was still too inconclusive despite developments in technology. Thus, it was even unreliable as supporting evidence.<sup>73</sup> In *Steen v Wetherlys*, the results were inadmissible evidence because they were derived from an unscientific test and reflected the mere opinion of the examiner.<sup>74</sup>

In most cases, however, the CCMA has adopted the approach that polygraph evidence was admissible but not conclusive on its own, and hence supporting evidence was required. The CCMA found in *SACCAWU obo Sydney Fongo v Pick 'n Pay* that:

'It appears...that the said test is regarded as *scientific* and therefore *acceptable by our Courts as a general rule*. However, it is not regarded as conclusive and must be considered in conjunction with other evidence...The employee underwent the test voluntarily. She did not raise any complaint about it in her evidence. I, therefore, find that the evidence of the polygraph test can indeed be *reliable*.'<sup>75</sup>

The examiner's opinion was admissible as expert evidence in *Mncube v Cash Paymaster Services* but the polygraph test was seen to be inconclusive and unreliable because the physiological changes could have been caused by mental and emotional factors other than lying.<sup>76</sup> In this regard, the CCMA included in its consideration the two expert opinions which the court had received in *Mahlangu* ten years ago. This is the view that the CCMA generally holds and it is the reason why the CCMA requires the employer to submit additional supporting evidence in order to successfully show that the employee committed misconduct in terms of a fair dismissal.<sup>77</sup> In *Josana v Macsteel*, the commissioner was satisfied that the examiner was 'properly qualified to do polygraph testing and to submit evidence as a specialist on the subject and his findings' and therefore did 'not find that the test was inaccurate as suggested by the applicant'.<sup>78</sup> Although polygraph evidence is not conclusive on its own and should be used as corroborating evidence only, it nevertheless makes the employer's version more probable.

Experts merely assist the court and therefore must restrict their statements to the scientific elements of the case. They may not give their opinion about the legal or general merits of the case.<sup>79</sup> The proceedings must remain in the court's hands and the fact-finding responsibility of the court may not be shifted to the witness.<sup>80</sup> In a dispute over an unfair dismissal for misconduct, for example, it is upon the commissioner to conclude whether the employee indeed committed the misconduct he/she is charged with. In terms of the

South African law of evidence, there is no general rule providing that a witness cannot state his/her opinion upon an ultimate issue, except for the legal or general merits of the case. The witness does not usurp the court's function because the court is free to reject the evidence. It assesses the probative value of the expert evidence and may agree with it or not. By its very nature however, polygraph evidence may diminish the court's role in making credibility determinations. The examiner usually offers an opinion to the court about whether the witness was deceptive or truthful in answering questions about the matters at issue. While most expert witnesses testify about factual matters outside the court's knowledge, for instance, about the analysis of fingerprints or DNA, the polygraph examiner provides the court only with another opinion, in addition to its own, about whether the witness was telling the truth. There is thus a great risk that the court will give excessive weight to the opinions of an examiner.

### **3.2 Fair reason for dismissal**

The LRA 66 of 1995 protects current employees against unfair labour practices, in particular unfair dismissal.

Where a company introduces periodic polygraph screening in the workplace and demands its employee to submit to a 'voluntary' polygraph test but the employee refuses to do so, the subsequent dismissal can be automatically unfair in terms of section 187(1)(c) of the LRA.<sup>81</sup> The employee can also claim that the reason for dismissal was unfair discrimination according to section 187(1)(f).

If the dismissal is not automatically unfair, the employer must show on the balance of probabilities that the dismissal was fair according to sections 188(1) and 192 of the LRA. The LRA requires the employer to establish, not merely suspect, that the employee is guilty of misconduct.<sup>82</sup>

#### **3.2.1 Failing a polygraph test**

In *Mahlangu* the Industrial Court did not accept the evidence because lie-detector results provided 'little more than suspicion'.<sup>83</sup> Other submitted evidence was not sufficient to show the employee's involvement in the thefts. The dismissal was therefore unfair. The CCMA and bargaining councils have adopted the approach that polygraph evidence on its own is not conclusive and therefore can only be used as aggravating factor together with other conclusive evidence in order to show misconduct.<sup>84</sup>

Although it is the employer's responsibility to show that the employee committed misconduct in terms of section 188(1)(a)(i) of the LRA, employers often administer the test, calling it a chance for the employee to 'clear' his/her name.<sup>85</sup> However, the request to undergo a test places the employee in an awkward position. If he/she refuses, the employer then argues that it indicates the employee was involved or knows something about the incident, which he/she is now trying to hide. If the employee fails while co-workers pass, his/her situation is not any better.<sup>86</sup>

Misconduct is usually difficult to prove in the working environment as a number of persons, employees and even clients have access to the property.

In this regard, polygraph testing is said to assist the employer in its investigation. The administration of the test is an attempt to obtain some evidence, preferably in the form of a confession. The polygraph test results provide additional information, in addition to the fact that the employee had access, and cases, in particular in cases of blanket testing, show that the test results often tip the balance of probabilities in favour of the employer. Having access constitutes circumstantial evidence and alone is not sufficient to show misconduct. Polygraph test results do not provide additional circumstantial evidence but rather suspicion; in the absence of objectivity and standardisation, they merely reflect the examiner's personal opinion.

In many disputes such as in *PETUSA obo Van Schalkwyk v National Trading Co*, the polygraph outcome is the tiebreaker making the employer's version more probable.<sup>87</sup> In this particular case, the employee was the only one of the five examinees who seemed deceptive. He denied that he had taken the sale cash box but offered to pay the money back, since as the supervisor he felt responsible. He also underwent a private voice analyser test, which he passed. The result was not accepted as reliable. The employee further claimed that more people had access to the cash box. The CCMA held that:

'If the above [employee's access to the property and his offer to pay back the missing money] was the only evidence to be taken into account I would be of the opinion that, despite some suspicion, the respondent had failed to establish that the applicant was guilty. The above situation means that it is necessary to consider the admissibility and reliability of the polygraph evidence ... In the instant case there were some independent indicators to support an inference of guilt and that the polygraph test results supported that inference to the extent where the guilt of the applicant has been proved on a balance of probabilities'.<sup>88</sup>

### **3.2.2 Refusal to undergo a polygraph test**

In some cases, employees were dismissed or disciplined simply for refusing to take a polygraph test, even in the absence of a polygraph clause in the employment contract, because it caused suspicion: the assumption was that an innocent person had nothing to hide and therefore would readily take the test while a guilty person would likely refuse.<sup>89</sup>

The employee cannot be compelled to take a test. According to section 12 of the Constitution, '[e]veryone has the right to bodily and psychological integrity'. Further, the rights to privacy and free will are protected in section 14 of the Constitution. The right to privacy includes the right not to have one's body searched.<sup>90</sup>

In this regard, the CCMA stated that:

'A polygraph test could constitute a violation of the employee's privacy and personal integrity. However, firstly the applicants had consented to the test ... and secondly, *this consideration would have to be weighed against the employer's operational requirements* or need to protect itself against losses sustainable

through acts of, for example, dishonesty and, in appropriate circumstances, a polygraph test might constitute the *most effective, or one of the most effective methods* of the employer's protecting its operational requirements in this regard.<sup>91</sup>

There is also no general obligation on the employee to take the test arising from the employment relationship. Obedience is regarded as an implied duty of every employee and the employee must comply with an employer's reasonable and lawful instructions.<sup>92</sup> However, such an instruction must be job performance-related.

The CCMA does not really deal with the issue but rather limits its focus to the weight that can be attached to the polygraph evidence. The issue was considered in *Meth, LC v Avscan International Consultants* where the employee was dismissed after he failed a random testing.<sup>93</sup> The CCMA held that an employer may request a polygraph examination in specific investigations, security firms or drug manufacturers, but may not dismiss or discipline because of the test outcome. The decision is similar to the exemptions provided under the US Employee Polygraph Protection Act of 1988 (EPPA). In *Harmse v Rainbow Farms (Pty) Ltd*, the company's action was found reasonable in the light of the circumstances of the substantial loss.<sup>94</sup> Following the EPPA as well, Christianson argues:

'The employer may request that the employee be subjected to a polygraph test to assist with this stage of the enquiry on the grounds that the employee had "access" to the property and that there was a "reasonable suspicion" that the employee was involved in the act of misconduct.'<sup>95</sup>

Due to the absence of regulations and authoritative case law, South African employers may require their employees to submit to testing at any time for any reason. In contrast, for instance, the EPPA restricts the use of blanket testing and polygraph screening in the private sector, as it requires an 'ongoing investigation involving economic loss' and 'reasonable suspicion' in respect of each employee (section 2006(d) of the EPPA).<sup>96</sup> According to EPPA, an employer may request but not require submission to testing.

Although employees are not generally obliged to undergo testing, they are actually forced to do so, especially where co-workers have agreed to submission, to avoid raising suspicion. The CCMA follows different approaches as to whether an employee's mere refusal to undergo a polygraph test can be regarded as an indication of his/her guilt. On the one hand, it was held that the employee is entitled to refuse as there is no duty upon him/her to take the test and then to co-operate, unless the employment contract provides for such an obligation. Therefore, the dispute resolution bodies may not draw any adverse inference from the refusal.<sup>97</sup> Mere refusal also does not constitute serious misconduct that warrants dismissal.<sup>98</sup> Yet, in some cases, the commissioners have regarded the employee's refusal as an indication of his/her guilt. For instance, the CCMA held in *Armoed v Gray Security Services* that:

'The second significant factor is Mr Armoed's refusal to undergo a polygraph test...to grasp this final opportunity to demonstrate

his innocence... To say that it would have been unnecessary to undergo the test does not hold water... It is appropriate to draw an adverse inference from his refusal'.<sup>99</sup>

In *Boonzaier v HICOR*, the CCMA held that the employee's 'initial reluctance to undergo the test, coupled with his subsequent failure where all other employees in the branch passed the test was evidence of' his involvement in the theft and hence justified his dismissal for misconduct.<sup>100</sup> In *HOTELLICA Trade Union v San Angelo Spur*, the CCMA held that the employee's 'refusal to take a lie detector test may not be interpreted as implying guilt, it can be regarded as an aggravating factor, especially where there is other evidence of misconduct'.<sup>101</sup> Furthermore, the CCMA held in *CEPPWAWU obo W A Francis v Thermopac* that:

[it was not] necessary to rely on the polygraph tests but it was clear that, whatever, criticism there can be against such tests the fact that Ms Petersen happily subjected herself to it and came out unscathed from the ordeal whilst the applicant had cold feet at the first moment should perhaps not be entirely ignored'.<sup>102</sup>

The CCMA also found that the employee must provide a rational reason for his/her refusal.<sup>103</sup>

An obligation on the employee to submit can arise from the employment contract itself. Many companies have included a polygraph clause in their employment contracts: The employee agrees to submit to testing whenever required by the employer, in particular in connection with periodic screening as a means of crime control. The CCMA finds such a clause legal and reasonable.<sup>104</sup> If a company's employment policy and practice require periodic polygraph testing of its employees, an employee who does not cooperate would then contravene that policy and practice and therefore can be dismissed for misconduct.<sup>105</sup> The employee could challenge that such a policy is invalid and unreasonable, is not applied consistently or that dismissal is not the appropriate sanction.<sup>106</sup> The policy was challenged in *Lefophana v Vericon Outsourcing* but considered as an indication of a lack of 'remorse whatsoever from the applicant who instead elected to dispute the validity' of the contract. Further, the employee's behaviour was found to be unfair towards the employer.<sup>107</sup>

The parties to an employment contract are basically free to decide on the contents of the contract. This freedom of contract is however subject to statutory and collective agreement restrictions designed to protect employees. If the clause is contrary to the law, it is invalid while the contract of employment itself remains valid. In the case of polygraph testing, the clause might violate section 8 of the EEA, which prohibits psychological testing in the workplace, although the section does not ban such testing completely.

### **3.2.3 Unfair labour practice**

The employee could also claim an unfair labour practice in terms of section 186(2)(a) of the LRA. An unfair labour practice refers to substantively and

procedurally unfair employer conduct in terms of promotion, demotion, probation or training. A labour practice is unfair if it lacks an objective standard and is simply arbitrary or inconsistent.<sup>108</sup> An employee may argue unfair treatment where the decision to promote or demote was based on a test outcome or the refusal to undergo a test. In *SEAWU obo Mdhuli v Controlled Chatterbox Services CC*, the employee was demoted after he failed a polygraph test.<sup>109</sup> Although the examiner testified an accuracy and reliability of nearly 100 per cent, the results were not regarded as conclusive evidence, but rather as a mere indication which was consistent with other evidence.

### **3.3 Employment Equity Act 55 of 1998**

The purpose of the EEA is to provide equal and fair treatment in compliance with sections 9 and 23(1) of the Constitution Act 108 of 1996 and the ILO Discrimination Convention 111 of 1958.<sup>110</sup> The EEA protects both current and prospective employees against unfair discrimination during the selection process. It does not apply to members of the National Defence Force, the South African Secret Service and the National Intelligence Agency.

Chapter II of the EEA restricts testing of current and prospective employees. Section 8 prohibits unfair discrimination by way of unfair testing and reads as follows:

‘Psychological testing and other similar assessments of an employee are prohibited unless the test or assessment being used

- (a) has been scientifically shown to be valid and reliable;
- (b) can be applied fairly to all employees; and
- (c) is not biased against any employee or group.’

There is some debate about whether the provision applies to polygraph testing. It is submitted that polygraph testing constitutes a form of psychological testing and therefore, section 8 of the EEA applies to such testing.

The EEA itself does not define psychological testing, although medical testing is defined in section 1. The 1996 Green Paper for the EEA stated that ‘[e]mployers should avoid psychometric tests unless they can demonstrate that they respect diversity.’<sup>111</sup> Psychological testing was initially not addressed in the Employment Equity Draft Bill 1997.<sup>112</sup> Section 8 of the Employment Equity Bill was included in the subsequent draft, which provided that:

‘Psychometric testing of an employee is prohibited unless the test being used – (a) has been scientifically validated as providing reliable results which are appropriate for the intended purpose; (b) can be applied fairly to employees irrespective of their culture; and (c) is not biased against people from designated groups’.<sup>113</sup>

The Parliamentary Portfolio Committee on Labour rejected the provision because of its limited scope and recommended amending its wording to the

current version by including the phrase 'other similar assessments'.<sup>114</sup> In particular, the word 'psychometric testing' was changed to 'psychological testing' to avoid disputes about whether an instrument is psychometric or psychological.<sup>115</sup> In fact, at the time when the EEA was drafted, employers abandoned psychometric testing in favour of interviews, or used psychometric tests but then argued that they were not in fact psychological tests and would therefore not fall within the ambit of the proposed legislation. By including the phrase 'other similar assessment', the legislature cast the net wider. The Parliamentary Portfolio Committee on Labour decided that all procedures and practices used in taking decisions about employees' careers had to be controlled.<sup>116</sup> Therefore, any device that is used to make any form of employee assessment, classification, or grading is included under the phrase 'similar assessment'.

Psychology deals, broadly speaking, with mental processes and behaviour.<sup>117</sup> Section 37(2) of the Health Professions Act 56 of 1974 (HPA) provides that psychology includes the evaluation of emotional processes by using and interpreting tests for the determination of aptitude or psycho-physiological functioning. Psychometrics is a division of psychology, which deals with 'the measurement of personality traits or personal characteristics in order to gather information about a person. This information is regarded as useful for predicting future behaviour'.<sup>118</sup> With regard to employment, psychometric testing means the assessment of an applicant in order to determine his/her suitability in terms of personality or the requirements of a specific position.<sup>119</sup>

The polygraph instruments do not measure thoughts, but rather physiological reactions caused by emotional stress, which can be the fear of being detected as a liar, but may also be due to anxiety or embarrassment about taking the test. The examiner draws an inference from the recorded physiological responses in order to determine its emotional cause and, in the case of event-free screening, to give a general predication about a person's character. Whether polygraph testing can actually detect lying and also predict behavioural tendencies, relates to the concept of validity.

Psychological tests need to be standardised and objective and both these aspects are incorporated in section 8 of the EEA, which also requires that the test is applied fairly to all groups of employees. Some scholars also include both concepts in the definition of psychological testing.<sup>120</sup> Hence, Christianson argues that:

'Psychological tests, including psychometric tests, are required to be standardized, valid and reliable and should furthermore be free from bias. When assessed by these standards, it is submitted that broadly speaking the polygraph falls short of acceptable standards for psychological tests ... it may still come within the definition of "other similar assessments"'.<sup>121</sup>

Raskin and Honts, both qualified psychologists and proponents of the polygraph, claim that polygraph testing can be conducted in an objective and standardised manner. They argue that a 'psychological test is a standardized procedure for sampling behaviour' and further '[s]ince the CQT is a psychological and psychophysiological test, we evaluate the extent to which each of the major polygraph techniques satisfies the general requirements of

a psychological test'.<sup>122</sup> This illustrates an unfortunate situation, namely, that if one supports accuracy of polygraph testing, it would fall within this definition of psychological testing. However, if one argues that polygraph testing is not objective and standardised, it does not constitute a psychological test.

Although decided in 1985 and therefore before the EEA came into force, the *Mahlangu* case provides some useful information on the issue. The court received expert evidence from two witnesses, who were both trained and registered psychologists. The one expert witness testified that:

'Lie-detector tests ... involve the testing and evaluation of mental and emotional responses to questioning and therefore constitute a form of psychological testing. The voice-analysers, as lie-detectors, are regarded by the professional board as C-level testing which means that a trained and registered psychologist is required to carry out and control these tests, which fall within the practice of psychology as defined by Act 56 of 1974.'<sup>123</sup>

In this regard, the court agreed with the witness.

The Psychometrics Committee of the Professional Board for Psychology at the HPCSA is the statutory body which classifies and legalises the use of psychological tests as well as prescribed questionnaires, apparatus and instruments for the determination of intellectual ability, aptitude, personality make-up, personality functioning, psycho-physiological functioning and psycho-pathology.<sup>124</sup> The HPCSA was established to determine standards of professional education and training, and to set and maintain excellent standards of ethical and professional practice. The developer, importer or distributor of a psychological test must apply to the Board for classification, which will then issue a classification certificate. Certification by a scientific organisation is considered as 'an important indicator of validity'.<sup>125</sup> The polygraph is not on the Board's list of psychological tests.<sup>126</sup> It has not been submitted for evaluation and classification.<sup>127</sup> Nevertheless, the Professional Board for Psychology considers the polygraph test to be a psychometric test. The Board released a media statement in 1999 on the 'legal and illegal use of psychometric tests including the polygraph' in which it expressed its opinion that:

'The polygraph, or lie-detector test as it is widely known, is completely unreliable and that the Board does not accept it as a valid test for the purposes in which it is commonly used in this country ... The [Board] wishes to emphasise that the use of the polygraph has not been approved by the Board'.<sup>128</sup>

The position of the dispute resolution bodies regarding section 8 of the EEA is not quite clear. There appear to be only two decisions on the issue, and these decisions have opposing approaches. In *PETUSA obo Van Schalkwyk v National Trading Co* the CCMA held that:

'A comparison of what is contemplated in the section and the basis of polygraph testing ... makes it clear that polygraph testing cannot be said to fall under s 8 of the Employment

Equity Act or the sections under the Health Professions Act and ... whatever the need might be to establish the controls that Dr Cooper [witness] and the HPCSA desire, it will need new legislation to achieve that.<sup>129</sup>

Further, the polygraph examiner, who was not a trained psychologist:

‘did not concede that psychology should be considered as the mother discipline noting that the jury was still out on the question and that there was a suggestion that it rather fell under criminology. I understand him to accept that there might be psychological conditions in a subject that might corrupt a polygraph test but he thought there was no clear acceptance of the effect of psychological stimuli on the physiology. The polygraph test measures physiological changes.’<sup>130</sup>

Given this argument, it seems peculiar that the CCMA then accepted the evidence. The mere physiological changes of the employee are irrelevant to the facts at issue, namely, whether the employee had indeed taken the sale cash box. It is also of some interest that the witness, Dr Cooper, who testified on behalf of the employee, was a trained psychologist and the chairperson of the Professional Board for Psychology at the Health Profession Council of South Africa (HPCSA) in 2000. He believed that polygraph testing is a form of psychological testing.<sup>131</sup> The CCMA stated that psychometrics dealt with the scientific measurement of mental capacities and processes and of personality, and held that a ‘similar assessment’ must have the same basis as psychological testing. The polygraph however measures physiological responses and ‘the result is an inference based on the variance in the responses’.<sup>132</sup> Hence, the CCMA did not consider the polygraph test as a ‘psychological test or other similar assessment’ and therefore neither section 8 of the EEA nor the relevant sections of the HPA 1974, which deemed such acts to pertain specially to the profession of a psychologist, applied to polygraph testing. The CCMA further held that the HPCSA had no jurisdiction over polygraph testing in terms of the current legislation.

When the CCMA considered the scope of section 8 of the EEA in *PETUSA obo Van Schalkwyk v National Trading Co*, it referred to Christianson’s articles and found that Christianson concludes that polygraph testing was different to psychological testing and that the HPCSA did not have jurisdiction over polygraph testing.<sup>133</sup> The CCMA agreed with this conclusion. Christianson argued that it is ‘unlikely that a polygraph test will be deemed to be a psychological or psychometric test’ but she left it open whether section 8 applies, particularly with regard to ‘other similar assessment’.<sup>134</sup> In particular, Christianson concludes that the nature of the test has yet to be established as well as whether the Professional Board for Psychology has jurisdiction over polygraph testing.<sup>135</sup>

The commissioner in *Mvemve & Another v Evertrade 77 (Pty) Ltd* came to a different conclusion regarding section 8 of the EEA. He stated that:

‘The legal status of the polygraph testing is, at best, highly questionable in the eyes of the courts and, at worst, it is likely that polygraphs would be found to be illegitimate in the light of

the provisions of the Employment Equity Act dealing with the validity of psychometric testing. In view of the imperfection of the polygraph system and the lack of solid research ... I conclude that polygraph testing has no scientific basis.<sup>136</sup>

Unfortunately, the issue was not discussed in any detail.

Section 8 must apply to polygraph testing in any situation, irrespective of the purpose of a particular test. Otherwise, the employer could argue that the test was conducted for a reason other than the actual purpose, in particular, that screening testing was in fact a specific ongoing investigation. Moreover, most examinations are administered in connection with a specific-event investigation.

Polygraph testing is therefore subject to classification by the Professional Board of Psychology, which was established under section 15 of the HPA. Even if a test is 'classified as a psychological test, the onus rests on the test user to ensure that the test is valid for the purposes for which it is being used'.<sup>137</sup> In terms of section 17, registration with the Board is prerequisite in order to practise as a psychologist. The HPA provides penalties in section 37 for a person who practises as a psychologist although he/she is not registered or if he/she uses an unclassified device. Furthermore, any person or institution that provides polygraph training must apply to Professional Board for approval in terms of section 16 of the HPA. Hence, only qualified psychologists who are registered with the HPCSA are permitted to use, interpret, and control psychological tests. Most polygraph examiners do not meet these requirements. Other professionals may use certain psychological tests if the Psychometrics Committee of the Professional Board for Psychology has certified the use of the test for that category of tester. In this regard, the examiner must obey whatever restrictions may be placed on the test's use relevant to the category of test user that he/she is registered as. The examiner must also seek monitoring from a psychologist where specialist input would enhance the testing process and the understanding of the test results. Finally, the examiner must be appropriately trained and must have achieved the minimum competencies required to use the test.<sup>138</sup> However, the minimum qualifications for polygraph examiners are not regulated.

We now briefly consider the requirements of section 8 of the EEA. The section does not prohibit psychological testing completely. The onus of proof is upon the employer to demonstrate that the test is valid and reliable, not biased and can be applied fairly to all employees.<sup>139</sup> The requirements are cumulative and apply to 'other similar assessments' as well.<sup>140</sup> It appears that there are no cases dealing with the section's scope, application and requirements apart from the above-mentioned two decisions on polygraph testing.

First, a test is valid if it measures what it purports to measure. Polygraph testing cannot determine a person's character relevant to the job, particularly his/her general truthfulness. Generally, an increased response to the test questions can be for reasons other than deception. The frequently-used CQT has a high rate of false positives. In terms of reliability, the test must produce consistent and repeatable results. The employer must provide evidence that a particular polygraph test is valid and reliable. However, legislation does not

distinguish between the different types of reliability and validity, nor does it require a certain degree of reliability and validity.<sup>141</sup> The general rules of evidence also do not require a particular degree of accuracy.

Section 8 of the EEA further requires a fair application to all employees, which necessitates some standardisation and objectivity in order to treat all employees consistently. In this regard, the section also refers to the validity and reliability of the test. Due to the personal interaction between examiner and examinee, polygraph testing cannot be standardised and therefore applied in a fair manner. Further, in terms of section 8, a professional who is registered with the Professional Board for Psychology must conduct the test.

Finally, the test may not be culturally biased. This refers to the misclassification of certain social or ethnic subgroups and in this respect to the concept of validity as well. Research has indicated that people from different ethnic groups do not react in the same way to stress. In particular, it will constitute indirect discrimination if the test shows 'a significantly lower or disproportionate pass rate amongst certain race or gender groups.'<sup>142</sup> Tests developed in other countries need to be adapted for use in South Africa.

### **3.4 Public employment**

The LRA and the EEA do not apply to members of the defence force, the intelligence and secret service. Polygraph testing is explicitly allowed in some parts of public employment and is mainly used for pre-employment and employment screening purposes, although there are no empirical studies showing the polygraph's accuracy and reliability in this particular context. Its accuracy is however believed to be low due to the general scope of the relevant test questions, resulting in a great number of innocent examinees being misclassified.

The National Strategic Intelligence Act 39 of 1994 (NSIA) and the Intelligence Services Act 65 of 2002 (ISA) explicitly permit the use of polygraph testing. Polygraph testing is mentioned in the sections 2A(1), (4)(a) and (b), (9)(a) as well as 6(3) of the NSIA, which deal with security screening investigations of persons rendering service or persons who going to do so, who have access in some way, particularly access to information and certain areas. Section 2A(4)(a) of the NSIA provides that in security screening investigations a polygraph may be used 'to determine the reliability of information gathered during the investigation.' Subsection (b) defines the polygraph as 'an instrument used to ascertain, confirm or examine in a scientific manner the truthfulness of a statement made by a person.' Based on the test outcome, the security clearance may be issued, degraded, withdrawn or refused. Section 1 of the ISA defines the polygraph examiner as a 'person who, in order to ascertain, confirm or examine in a scientific manner the truthfulness or otherwise of statements made by another person, uses skills and techniques in conjunction with any equipment and instrument designed or adapted for that purpose.' Security service 'entails performing the functions of a polygraphist'. Section 14 of the ISA deals with security screening in the appointment and discharge of members of the Intelligence Service, and a person may be appointed only if 'information with respect to that person has been gathered in the prescribed manner in a security screening investigation by the Intelligence Services.' According to sections 14(3) and 14(4)(a) of the

ISA, '[t]he Director-General may engage the services of a polygraphist to determine the reliability of the information gathered' and issue directives on the use of polygraph testing.

The significance and effectiveness of polygraph testing in the public sector, especially the intelligence and security services is not clear. There have been no relevant cases to test or throw light on outcomes of testing.

#### **4. International labour standards**

International labour standards are established at the international level and serve as benchmarks in comparative law. They also help to adapt national labour legislation even in countries which have not ratified them, and help to provide fair work conditions, particularly in developing countries.<sup>143</sup> Furthermore, international labour standards have an impact on national policies and judicial decisions. In South Africa, international law plays a particularly significant role. Courts, tribunals and forums must consider international law when interpreting the Constitution and employment law.<sup>144</sup> The current South African employment legislation takes cognisance of International Labour Organisation (ILO) ideals, probably more so than any other legislation enacted in other jurisdictions in the last two decades.

There are various sources of international labour law with different legal characteristics. Some instruments are legally binding upon ratification while others merely guide national action. The ILO Conventions and Recommendations are the 'main source of international labour law' because of their number, comprehensive character and broad scope.<sup>145</sup> We therefore focus on the labour standards adopted by the ILO. South Africa rejoined the ILO in 1994.

Other organisations such as the United Nations Organisation (UN), the African Union (AU), the Council of Europe, and the European Union (EU) have also adopted standards and treaties to prohibit unfair discrimination,<sup>146</sup> ensure fair dismissals<sup>147</sup> and to protect employees' personal data.<sup>148</sup> South Africa joined the UN in 1945 and is also a member of the AU. The instruments established by regional institutions supplement the universal international standards, but do not replace them.<sup>149</sup> They deal with labour issues in a more general sense and in terms of human rights, and therefore are not discussed here.

Two ILO conventions are relevant in the context of polygraph testing, namely, the Discrimination (Employment and Occupation) Convention 111 of 1958 and the Termination of Employment Convention 158 of 1982. Does the use of polygraph testing in the workplace constitute unfair discrimination under the Discrimination Convention? And secondly, is it fair in terms of the Termination of Employment Convention to dismiss an employee because he/she has failed a polygraph test or has refused to undergo an examination? South Africa ratified the Discrimination Convention in 1997 and adopted various relevant legislation. Furthermore, the ILO Code of Practice on the protection of workers' personal data of 1997 deals with data collection in the workplace and contains a specific provision on polygraph testing. The considered ILO instruments do not support the use of polygraph testing in employment.

#### 4.1 Discrimination Convention 111 of 1958

During the course of employment, the employer must ensure fair selection procedures when considering certain employees for action such as promotion, demotion, transfer, or dismissal. Job applicants must undergo a fair recruitment procedure. Fairness is particularly crucial in the latter case when candidates are requested to submit to testing and are selected for employment or rejected according to the outcome of such a test.

Generally speaking, discrimination means to differentiate or to treat a person differently but it does not necessarily constitute *unfair* discrimination.<sup>150</sup> It amounts to unfair treatment if a person is treated less favourably on one of the grounds listed in the Convention itself or specified by national law. The Convention itself defines discrimination in article 1(1)(a) as 'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'. The Convention does not exclude any kind of employment or occupation, and therefore it applies to both private and public employment. The list of grounds is not exhaustive and in terms of article 1(1)(b) of the Convention, the member states may also address discrimination on additional grounds.

Section 9(4) of the South African Constitution explicitly provides that persons may not be unfairly discriminated against on 'grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'. Further, the Constitution provides for 'the right to fair labour practices' in section 23(1). Chapter VIII of the South African LRA prohibits unfair dismissal and unfair labour practices. In terms of section 187(1)(f) of the LRA, if the reason for dismissal was unfair discrimination, then the dismissal is automatically unfair. Unfair discrimination was addressed in item 2 of schedule 7 of the LRA, and this item broadly prohibited discrimination 'on any arbitrary ground including, but not limited' to the grounds listed. This provision was replaced by the EEA. Section 2 of the EEA states that the purpose of the Act is to eliminate unfair discrimination 'by promoting equal opportunity and fair treatment in employment'. Section 6(1) of the EEA is similar to article 1(1)(a) of the Convention but defines more explicit grounds for unfair discrimination. Furthermore, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 covers a wide range of practices and sectors, including employment, and applies to areas which are not regulated by the EEA.

The Convention requires 'equality of opportunity or treatment in employment', which entails fairness in terms of an employee's selection for purposes of promotion, demotion, or transfer. The employer may decide which qualifications and requirements are needed to hire, transfer or promote a person but may not discriminate against others. Section 6(1) of the EEA prohibits unfair discrimination 'in any employment policy or practice', which includes, according to section 1 of the EEA, 'recruitment procedures, advertising and selecting criteria', 'appointments and the appointment process', 'performance evaluation systems', 'promotion', 'transfer', 'demotion',

and 'disciplinary measures other than dismissal'. In this regard, the employee must demonstrate that his/her selection or non-selection was the result of unfair discrimination. Performance evaluation systems might include pre-employment and employment polygraph screening, which are conducted to determine whether a person is generally truthful. In terms of promotion, the employee must show that he/she was not selected due to unfair failure or refusal to promote, and that the employees who were appointed were given preference on irrelevant criteria and not related to their qualifications and experience.<sup>151</sup> Demotion is not allowed under the common law without the employee's consent, except for some instances, such as demotion 'as a disciplinary penalty imposed for a valid reason and after a fair procedure'.<sup>152</sup> Transfer can amount to constructive dismissal unless it brings little or no inconvenience.<sup>153</sup>

In article 1(3), the Convention includes 'access to employment' in the definition of 'employment'. Hence, job applicants are protected against discrimination as well. Although it is in the employer's discretion to employ whom he/she wants to employ, the employer may not discriminate and courts may consider whether the job applicants underwent a fair recruitment procedure. Applicants may challenge their non-selection and claim that the employer failed to select or consider them for appointment because of unfair discrimination.<sup>154</sup> Section 1 of the EEA defines 'employment policy or practice' to include 'recruitment procedures, advertising and selection criteria'. The qualifications required for certain jobs, must correspond to the objective characteristics of those jobs and be in proportion to those specific characteristics.<sup>155</sup> In terms of pre-employment testing, it is required that the test indeed helps in assessing whether the candidate is suitable for the job.<sup>156</sup> The LRA does not apply to job applicants. They are however included in the scope of EEA in terms of unfair discrimination according to section 9.

Some differentiations do not amount to discrimination under the Convention, for example, where the inherent requirements of a job make the distinction or exclusion necessary (article 1(2) of the Convention). In this regard, the employer must show that the differentiation 'served a legitimate employment goal'.<sup>157</sup> Section 6(2)(b) of the EEA has the same wording as the Convention. Can a specific job therefore necessitate the administration of a polygraph examination? The employer may argue that a particular job requires an employee to have specific personal characteristics such as general reliability and honesty. This is essential for jobs which require a high level of trust, for instance, positions within security services or banks. However, polygraph testing cannot determine the general honesty or future tendencies of a person. It would therefore be difficult for the employer to show that the administration of polygraph testing in the workplace is justified.

None of the seven grounds listed in article 1(1)(a) of the Discrimination Convention applies directly to polygraph testing. The provision refers to personal characteristics of a person, which are deemed irrelevant to the job. The catalogue in article 1(1)(a) is not exhaustive and where different treatment took place on any other than the listed reasons, in particular on polygraph test results, it is upon the employee to demonstrate unfair discrimination. In this regard, the South African Constitutional Court and the Labour Courts held that 'there will be discrimination on an unspecified ground if it is based on attributes and characteristics which impair the fundamental

dignity of persons as human beings or affects them adversely in a comparable way' to the listed grounds.<sup>158</sup> Thus, the mere unreasonable actions of an employer do not constitute discrimination. The employee must show the existence of a 'close link, based on dignity, between the two groups of grounds' and must also show that the differentiation on the unlisted ground was unfair.<sup>159</sup>

According to article 1(1)(b) of the Convention, member states may specify grounds in addition to those specified in the Convention. South Africa has included additional grounds in the EEA, particularly in chapter II, which addresses unfair discrimination. According to section 3(d), the EEA must be read together with the Convention. Section 6(1) of the EEA lists additional grounds upon which an employer may not discriminate against an employee or applicant. The EEA further requires equal treatment in terms of employee testing. In this regard, the statute protects both current employees and job applicants against unfair discrimination.<sup>160</sup>

At an international level, 'medical and psychological testing have long been contentious because of their potential' for indirect unfair discrimination through the imposition of unjustifiable or unreasonable requirements on employees or job applicants.<sup>161</sup> For instance, when employment is denied because of pre-employment testing, the testing must be job-related or relevant to the job, in particular the 'applicant's ability to do the job or to the requirements of the effective performance of the job'.<sup>162</sup> Some jurisdictions have adopted provisions to protect employees against discrimination, for example, the USA where pre-employment medical testing of disabled applicants is prohibited.<sup>163</sup> In Germany, medical examinations may be administered only if the law requires them, for instance, in the food sector in terms of section 18 of the Federal Epidemics Control Act. Comprehensive personality tests are not permitted. Testing requires a person's explicit consent and must be restricted to the scope and demands of the particular job.<sup>164</sup>

The EEA does not only protect certain categories of people, it prohibits any form of unfair testing. In particular, the EEA prohibits testing of an employee in order to determine his/her HIV status, and restricts any other medical testing (section 7) and psychological testing (section 8). Section 8 of the EEA provides that a test must be scientifically 'valid and reliable' and 'can be applied fairly to employees' and 'is not biased against any employee or group'. The employer must demonstrate that the applied testing meets all requirements and that it was fair (section 11 of the EEA).

However, there is no empirical evidence to show that polygraph testing is accurate and reliable, particularly in the employment-screening context. Employees are disciplined or dismissed based on a test that lacks standardisation and objectivity. If a test is not valid and reliable, the same situation might be treated differently and the applied method has a high potential for unfair discrimination, in particular if a disciplinary action was based solely on the outcome of a polygraph test. Where there is no objective justification for the differentiation, the distinction is said to be arbitrary and not based on a relevant ground.<sup>165</sup> In terms of polygraph testing, it means that those examinees are discriminated against who answered truthful but the polygraph test incorrectly identified them as liars or 'false negative'

respectively. The test has a high rate of erroneously classified innocent examinees. According to the outcome of the test, it entails different disciplinary action against the employees. For instance, the one examinee fails, hence it indicates misconduct so he/she is demoted or dismissed. While another employee passes the test, he/she is promoted. However, different test results do not justify different treatment. It can also constitute unfair treatment if all applicants or employees are required to undergo a polygraph test for employment screening or blanket testing. It appears to be fair and equal if the test is applied to all employees or applicants but in fact, it is discriminating against a certain group of people, in particular the falsely identified innocent employees. Studies have also indicated that people from different ethnic groups show different stress responses. Therefore, the use of polygraph testing could also amount to indirect unfair discrimination based on a listed ground, namely 'race'. A test needs to be adjusted if used on members of different cultural groups.

Employees are also disciplined merely because they have refused to take a polygraph test, as happened in *Polkey v Transtecs Corporation* and in *CEPPWAWU obo W A Francis v Thermopac*.<sup>166</sup> The employee is entitled to refuse, so he/she must claim that the refusal constitutes an irrelevant ground for differentiation, which amounts to unfair discrimination. Where the employment contract contains a polygraph clause, the employee should challenge the validity of such a clause. Moreover, the employee's consent to submit to testing if the employer so requires does not imply that the employee has waived the right to claim discrimination, because his/her consent is irrelevant in this regard. The employee has only agreed to undergo the test; the employer must still always ensure and show that the employee is not subjected to unfair discrimination. Therefore, the employee can still claim discrimination.

Due to the lack of empirical proof, the use of polygraph testing in the workplace has obvious potential for unfair discrimination in terms of the Discrimination Convention.

#### **4.2 Termination of Employment Convention 158 of 1982**

In a number of South African labour disputes, employees were simply dismissed because they did not pass a polygraph examination or refused to undergo one. The Termination of Employment Convention 158 of 1982 obliges ratifying states to establish, in conformity with the instrument, grounds upon which a worker's employment can be terminated. The Convention further provides a number of grounds upon which the employee may not be dismissed.

The Convention applies to all sectors and employees but member states may exclude certain types of employment, such as specified period of employment, probation, and casual work (article 2). National legislation may also exclude public employees from general labour provisions and subject them to special arrangements.

The Convention requires a 'valid reason' for dismissal in article 4, related to the worker's capacity or conduct or the dismissal was based on operational requirements. The definition of valid reason is left to the implementation of the

individual member state. Articles 5 and 6 of the Convention list a number of reasons which do not constitute a valid reason for dismissal, such as union membership, race, age, or sex. The list is however not exhaustive. The individual state may provide additional reasons to protect employees.<sup>167</sup>

Although South Africa has not ratified the Convention, it has adopted similar provisions. Section 23(1) of the Constitution respects the employee's fundamental right 'to fair labour practices', which implies for instance fairness in terms of dismissal. Other relevant provisions can be found in the LRA. Section 188(1)(a) of the LRA requires that the dismissal must be based on a 'fair reason', consistent with the wording of the Convention. The onus is upon the employer to show that the dismissal was fair. An employee may claim automatically unfair dismissal in terms of section 187 of the LRA, similar to articles 5 and 6 of the Convention. The *Code of Good Practice: Dismissal*, which is in schedule 8 of the LRA, provides guidelines for a fair dismissal due to an employee's conduct or capacity. The LRA also contains a Code of Good Practice on Dismissal based on Operational Requirements.

As far as polygraph testing is concerned, the employee's deceptive outcome or his/her refusal to submit to a requested test must constitute valid reasons under the Convention. Polygraph testing is administered to assist the employer in investigating specific misconduct or a crime that has occurred in the workplace, which in many cases results in the dismissal of the alleged perpetrator.<sup>168</sup> The employer must however show, on the balance of probabilities, that the employee is indeed guilty of misconduct. Polygraph test results cannot supply satisfactory evidence, particularly in the employment context in the case of periodic screening of staff members. Due to the lack of plausible theoretical and empirical foundations, the test outcome cannot result in more than mere suspicion. This is particularly true if the employee was dismissed solely because he/she failed the polygraph examination. Where dismissal is based on the test outcome and other evidence such as a witness, it must be treated with great caution. In particular, the other evidence should not be assessed in the light of the results of the polygraph test.

In respect of dismissal due to the employee's refusal to undergo testing, employers argue that an honest person has nothing to hide and therefore would agree to the test. This statement certainly applies to a number of cases. However, some people simply refuse because they fear a negative outcome although they are innocent, or they have doubts about the polygraph's accuracy. A person is not obliged to take a polygraph test. The situation might be a different one where the employment contract contains a clause in terms of which the employee agrees to submit to periodic polygraph testing. In this regard, the employee's insubordination, breach of contract, might constitute the misconduct. It is however questionable whether such a clause is actually legitimate. According to the ILO General Survey by the Committee of Experts in 1995, refusal to take a polygraph test can amount to an invalid reason for termination if the member state provides so.<sup>169</sup> In South Africa, there are divergent CCMA judgments on the issue. In some cases, the commissioner held that refusal could not be used as an indication of guilt.<sup>170</sup>

A person who fails a test or refuses to take one is regarded with suspicion. Hence, the question arises whether suspicion can be a 'valid reason' for dismissal in terms of the Convention. The employer may argue reasonable

suspicion of misconduct, or that the employee might do so in the future, and therefore may argue that the 'mistrust is counter-productive to the operation of the business'.<sup>171</sup> The breakdown of trust between the parties would constitute the fair reason for dismissal based on operational requirements, particularly the 'similar needs' of the business. However, it seems to be highly questionable whether the mere refusal to submit to a polygraph testing can constitute reasonable suspicion since the employee's refusal is not necessarily an indication of guilt. Where an employee did not pass the test, it is also doubtful whether this result provides a strong and valid basis, which is more than mere suspicion about the employee's involvement in the incident, particularly in the case of periodic screening, as the polygraph examiner might not have correctly classified the employee.

### **4.3 Code of Practice on the protection of worker's personal data of 1997**

The ILO adopts codes of practices to reduce the amount of legislative text.<sup>172</sup> A code seeks to maximise flexibility by avoiding binding prescription. A code contains guidelines instead and does not replace national law or international standards.<sup>173</sup> It provides employers and employees with the basis for rules to be designed by them so that they can 'shape the code according to their own expectations and needs'.<sup>174</sup> It is regarded as 'soft law'.

The ILO Code of Practice on the protection of workers' personal data of 1997 appears to be the only international labour instrument which explicitly addresses the use of polygraph testing in the workplace. In particular, clause 6.10 of the Code specifically deals with polygraph testing.

Personal employee data is collected for various reasons: to assist the employer in selecting individuals for employment, training and promotion, and to protect the employer's property. The different techniques used to gather information about an employee 'illustrate the need to develop data protection provisions which specifically address the use of workers' personal data' to protect the employee's right to dignity and privacy.<sup>175</sup> The term 'personal data' includes any information about an individual employee.<sup>176</sup> The Code does not only address current employees but also includes job applicants in its scope, according to the definition in clause 3.4, as well as former employees 'since the processing of personal data has implications for job applicants, current workers and former workers'.<sup>177</sup> Further, the Code applies to both public and private sectors in terms of clause 4.1(a).

The Code contains general principles and regulations on the process of data collection. An employer may not gather any information in which he/she is interested. Clause 5.1 of the Code requires that the processing of personal data is directly relevant to the employment of the worker. The employer must have a legitimate interest in the collection of employee data in terms of the employment relationship. The collection of personal data is therefore the exception which needs to be justified. It is not the worker's duty to inquire why certain information is wanted or to explain a refusal to provide it, but rather the employer's duty to indicate the reasons and to process only as much personal data as is necessary.

The Code further supports correct evaluation of data and therefore rejects an entirely mechanical decision-making process. The Code requires individualised evaluation of employees.<sup>178</sup> Clause 5.5 provides that ‘decisions concerning a worker should not be based solely on the automated processing of that worker’s personal data.’ The term ‘solely’ indicates that the provision does not reject *per se* the use of automated procedures, and employers may use them to assist them in making decisions.<sup>179</sup> In the context of polygraph testing, this means that the employer may not dismiss an employee solely because he/she failed the test.<sup>180</sup>

Clause 6.10 of the Code provides that ‘polygraphs, truth-verification equipment or any other similar testing procedure should not be used.’ Unlike in other instances of data collection under the Code such as medical or drug testing, the Code does not provide any exemptions for the use of polygraph testing. In particular, clause 6.10 does not state that polygraph testing can be admissible in terms of national legislation. Employers may not even use polygraph testing as an assisting tool in terms of clause 5.5. Employees and applicants are entitled to refuse to undergo a polygraph examination. The ILO seeks to protect the employee’s right to human dignity. However, ‘many types of tests administered in the workplace to assess the physical or psychological aptitude of workers, or to verify their honesty, offend against worker dignity if they are overly intrusive, or assess for characteristics unrelated to the work’.<sup>181</sup> Moreover, one must bear in mind that:

[in terms of pre-employment testing] the ability of workers to withhold consent is most constrained, so that the marketplace and the parties’ relative bargaining positions principally determine whether testing is to take place. There may, however, be a larger societal interest in imposing controls on certain kinds of testing which are intrusive, demeaning, or of dubious relevance or reliability, particularly as the workers who tend to be affected most by such practices are those with the least power to refuse to submit to them.<sup>182</sup>

At the ILO Meeting of Experts on Workers’ Privacy in 1996, where workers’ and government representatives met to discuss the draft Code on the protection of employee data, it was found that the use of ‘lie detection equipment was invasive’ and it was further suggested that:

[legislation should be adopted to] impose minimum standards on their use: strict principles would need to be adhered to in respect of their use, which include a minimum degree of reliability and validity; administrators of the test should be qualified; and the details of the test results should not be disclosed, only whether the person was suitable for the job or not’.<sup>183</sup>

However, the Code does not impose obligations on the ILO member states and national law may therefore allow polygraph testing in terms of the Code. The Code aims to assist national legislation, collective agreements, policies and practical measures to conform to international labour standards and makes recommendations on the issue. The ILO did not adopt an internationally binding instrument on employee data protection for several

reasons. No agreement could be reached at the Meeting of Experts in 1996 about the adoption of international labour standards on data protection.<sup>184</sup> Codes are also preferred to internationally binding instruments 'when the subject matter is not, or not yet, suitable for sophisticated standard-setting action' such as with employee data protection.<sup>185</sup> The adoption of a more formal instrument in the future is rather 'unlikely because the ILO is in fact moving in the opposite direction, having recently adopted a general policy of targeting and consolidating certain existing core standards for greater impact' in response to the proliferation of international instruments.<sup>186</sup>

The Code standing on its own cannot provide sufficient protection. It therefore requires the existence of specific national regulations or regulations at international level.<sup>187</sup> For instance, the Council of Europe adopted the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, which however is of a general scope and does not address employment specifically,<sup>188</sup> as well as the Council of Europe Recommendation on the Protection of Personal Data used for Employment Purposes.<sup>189</sup> The EU adopted Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, which applies to the employment context. However, because of its general scope, the Directive cannot adequately address all issues arising from the specific employment relationship.<sup>190</sup> South Africa does not have specific legislation which regulates the collection and processing of personal employee data, except in the public sector. In terms of security screening in certain public employment, polygraph testing may be administered to confirm information gathered about an employee. Article 14 of the Constitution provides a general right to privacy, which includes the right to privacy in the workplace. This right protects not only the employee's right to physical privacy, but also the privacy of his/her personal data.

Although it is a member state's responsibility to regulate the use of polygraph testing in employment, the ILO Code indicates the need to adopt national regulations on employee data protection, particularly when dubious technology is widely applied in workplaces to collect such data. It also shows that the ILO aims to ban polygraph testing completely from workplaces, as the Code provides no exception for its use in the employment context.

## **5. The United States of America**

The USA constitutes the key source of reference when it comes to polygraph testing in the workplace as it has specific codified law regulating its use. The private industry also experienced a very similar situation to that of the current South African situation about 20 years ago. The US government still applies tests on a large scale as part of its security-screening programme in order to detect spies and saboteurs among its applicants and current employees, or any other national security threats.<sup>191</sup> In addition, the South African dispute resolution bodies have referred to US legislation, particularly the EPPA, and case law in numerous instances.<sup>192</sup>

The private industry in the USA has greatly increased its use of polygraph testing since 1978 to about two million tests in 1989.<sup>193</sup> Polygraph testing started with investigations into specific incidents but continued with periodic testing and pre-employment screening.<sup>194</sup> About 70 per cent of the

examinations were pre-employment screening, 15 per cent were periodic tests, and merely 15 per cent constituted specific investigations.<sup>195</sup> Before the EPPA came into force, employers were entitled to establish under the National Labour Relations Act of 1982 'in-house rules', for the use of polygraph testing without committing an unfair labour practice.<sup>196</sup> The so-called 'at-will' doctrine allowed employers to terminate employment at any time, without advance notice and for any reason.<sup>197</sup> For instance, in *Swope v Florida Industrial Commission Unemployment Compensation Board of Review*, the employer introduced a rule which required its employees to undergo periodic polygraph testing. The court held that the employer was entitled to do so and so the employee's refusal constituted misconduct, namely violation of an employer's rule, and a valid reason for dismissal.<sup>198</sup>

Concerns about the accuracy of the polygraph and its widespread use and in particular misuse in the private sector finally led to the enactment of the EPPA in 1988. The Senate report on the EPPA noted that 'probably between 100,000 and 300,000 fewer individuals will be wrongfully denied employment opportunities solely due to the inaccuracy of the testing procedures'.<sup>199</sup> However, the content of the new statute was subject to great debate, which then resulted in an Act that does not completely prohibit polygraph testing.<sup>200</sup> The employee may request a test for exonerating purposes. The EPPA does not apply to public employment. Apart from the federal EPPA, most states have explicit provisions restricting the polygraph testing of employees with some legislation being more restrictive than the EPPA. Most state codes however provide exceptions, often similar to the federal provisions. We will only consider the EPPA.

The EPPA prohibits most private employers from using polygraph testing either for pre-employment screening or for random testing during the course of employment. An employer may not 'directly or indirectly, require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test' (section 2002(1) of the EPPA). In this regard, it is necessary to establish whether the employer plays an active or mere passive role in the administration of the test.<sup>201</sup> The employer may also not 'use, accept, refer to, or inquire concerning the results of any lie detector test of any employee or prospective employee'. Therefore, the employer may not even use the results of a polygraph test that was conducted by the police.<sup>202</sup> Subsection 3 contains a special prohibition from disciplining, discharging, or discriminating against any employee or applicant based on the test results or refusal to undergo testing. According to section 2007(a), refusal to undergo testing may only be considered together with 'additional supporting evidence'.

The EPPA also provides that the examiner must meet minimum qualifications such as 'a valid and current licence granted by licensing and regulatory authorities' as well as minimum liability coverage of US\$ 50,000 or an equivalent amount (section 2007(c)(1) of the EPPA). The examiner may merely analyse the test results and base his/her conclusion solely on the results. This analysis may not include any personal recommendations concerning the examinee's employment.

However, the EPPA provides several exemptions for the private sector, in particular the 'ongoing investigation' exemption (section 2006(d) of the EPPA). In this regard, a specific incident 'involving economic loss or injury to

the employer's business' must be under investigation such as theft or fraud. Hence, unspecified random testing of employees and pre-employment screening are excluded. Under the exemption, the EPPA also requires that the employee had 'access to the property', and that the employer had 'reasonable suspicion that the employee was involved in the incident'. The latter requirement limits the use of blanket testing of a group of employees and hence it considerably restricts the use of the polygraph in the employment context. For instance, in *Polkey v Transtecs Corporation*, the court held that in terms of the ongoing investigation exemption, section 2006(d)(3) requires the employer to show 'reasonable suspicion as to each individual employee'.<sup>203</sup> However, if the employer fails one of the requirements then the exemption is not applicable and the employer becomes liable under the EPPA. In terms of section 2007(a)(1) an employee may not be dismissed, disciplined, or even promoted solely on the basis of the result of a polygraph test or the refusal to take one, in order to reduce the possibility of inaccurate results. The section itself provides for that 'the evidence required by such subsection may serve as additional supporting evidence'. According to the clear unambiguous language of the provision, confirmed by the Department of Labour regulation 801.20(b), access and reasonable suspicion may serve as supporting evidence and one of the two factors would be sufficient. Yet in this case, section 2007(a)(1) would be superfluous because the employer has to have both already under section 2006(d). Unfortunately, there appears to be no case law which would help to clarify the problem.

The EPPA provides further exemptions for private employers in the security and pharmaceutical services (sections 2006(e) and 2006(f) of the EPPA). In this regard, the EPPA also allows pre-employment polygraph screening. During the course of employment, an examination may only be conducted if it 'is administered in connection with an ongoing investigation of criminal or other misconduct ... or loss or injury to manufacture'. The employer must only establish that the employee had 'access to the ... subject of investigation' (section 2006(f)(2)(B) of the EPPA).

The courts apply the EPPA very restrictively so it is difficult for an employer to use the test under the exemptions. Therefore, the EPPA has helped to reduce the use of polygraph testing in the private sector. Since the enactment of the EPPA, a private employer remains on the safe side if he/she dismisses or disciplines an employee on mere suspicion rather than trying to investigate and strengthen its suspicion with the help of a polygraph test.<sup>204</sup> There are not many judgments dealing with claims of violation of the EPPA and most decisions address the notion of 'employer' in terms of section 2001(2) for purposes of liability.<sup>205</sup> A very few consider claims regarding the 'ongoing investigation' exemption.<sup>206</sup> There appears to be only one case where it was held that the employer had complied with the EPPA. In *Burton v Gerland's Food Fair, Inc.* the court did not find any violation of the EPPA.<sup>207</sup> The court found that the employer had complied with the requirements of the 'ongoing investigation' exemption. In particular, the court considered whether the employee had 'access to the property' and whether the employer showed 'reasonable suspicion'. Unfortunately, the judgment does not mention what kind of supporting evidence the employer had submitted as required by section 2007(a).

However, there are some inherent inconsistencies and problems with the EPPA. The Act opens the door to constitutional challenges asserting privacy violations and lack of equal protection. The EPPA has been primarily enacted to protect employees from their employer's decisions based on inaccurate polygraph test results. Yet, the EPPA fails to serve this main purpose as it provides for exemptions. The statute also allows pre-employment screening in some instances although there is no proof of accuracy, and although it is believed that the polygraph is less accurate than when used in a specific investigation. The EPPA establishes requirements and qualifications for examiners. The provision is obviously designed to promote test accuracy. It is believed that the polygraph's accuracy depends mostly on the competency of the examiner. Yet, the theory underlying polygraph testing is inherently flawed. The use of polygraphs is always linked with uncertainty due to the diversity of human responses and likely human errors. The provisions do not guarantee accuracy.

Regarding the law of evidence, the US courts have established general requirements of admissibility of scientific evidence in both civil and criminal proceedings and in this regard, the courts consider the relevance and reliability of polygraph testing. Although the *per se* inadmissibility rule regarding polygraph evidence was abandoned by the *Daubert* judgment in 1993, courts are generally reluctant to admit the evidence.<sup>208</sup> Test results may not be the tiebreaker in a case.

In particular, the Federal Rules of Evidence of 1975 (F.R.E.) regulate the admissibility of evidence in both civil and criminal proceedings. According to these rules, evidence must be relevant, reliable and must assist the court in fact finding. Further, it may not have an unfair prejudicial effect and may not be used solely to bolster or undermine the credibility of a witness. Prior to the enactment of the rules, the federal system relied on case law, and courts did not accept the outcome of a polygraph test. The US Supreme Court has developed standards regarding expert evidence, which also apply to polygraph evidence. These standards have changed over the years. In 1923, the court held in *Frye* that scientific evidence must be generally accepted within its scientific community in order to be admissible evidence.<sup>209</sup> The polygraph was not accepted. *Frye* became the seminal polygraph case and consequently, over the next seven decades, virtually every state and federal court prohibited the admission of polygraph evidence, believing that substantial consensus in the scientific community promotes uniformity of decision. However, admissibility of evidence cannot be decided based solely on general scientific acceptance and *Frye* as a rigid standard is not easy to apply to the individual case. With the introduction of the F.R.E. in 1975, the *Frye* standard had to be reconsidered. In 1993, the Supreme Court developed a more tolerant approach towards polygraph evidence in *Daubert*. The *Daubert* criteria for assessing reliability and validity of scientific evidence are (1) the testability of the technique; (2) whether it has been subject to peer review and publication; (3) the technique's known or potential error rate; (4) the existence and maintenance of standards controlling the technique's operation, and (5) whether the technique has been generally accepted within the scientific community.<sup>210</sup> The list of the factors is not an exhaustive list.<sup>211</sup> Since *Daubert*, polygraph evidence is not inadmissible *per se* anymore. The F.R.E. and *Daubert* judgment require an isolated consideration of the admissibility of the polygraph evidence and it may not be excluded simply

because it refers to an ultimate issue. It is in the trial court's discretion to allow polygraph evidence. However, most courts still exclude the evidence under the rules of evidence while some admit it.

## **6. Federal Republic of Germany**

Germany, in respect of polygraph testing, provides a good contrast. Based on legislation and case law, German employers are prohibited from administering polygraph testing. Unlike the USA, Germany does not have any codified law which explicitly regulates the use of polygraph testing in the workplace. Moreover, only a small number of court cases exist, which are mainly consistent and strict about the exclusion of polygraph evidence, even where the accused had requested its admission. No adverse inference may be drawn from the refusal to undergo a test, since the suspect has the right to remain silent.

Polygraph evidence occurs mainly in criminal proceedings and these cases therefore contain comprehensive arguments on its admissibility. The Supreme Court (BGH) also held in 2003 that the same rules established for criminal proceedings must apply to civil proceedings. The civil procedure law in turn applies to labour disputes.

The courts' main concern with regard to polygraph evidence is to respect a person's constitutional rights. This approach illustrates some fundamental rights of the examinee that might be at issue in polygraph testing. For decades, the courts emphasised that the accused is party to the proceedings and not merely the object. It was believed that polygraph testing violated the examinee's constitutional rights, particularly his/her right to human dignity. Consequently, since 1945 polygraph evidence has been rejected. The BGH has held that the outcome of a polygraph examination is not admissible evidence in both criminal and civil proceedings.<sup>212</sup> Further, the Federal Labour Court (BAG) has found test results inadmissible in labour court proceedings.<sup>213</sup> The Federal Constitutional Court (BVerfG) has rejected polygraph evidence as well.<sup>214</sup> The courts' arguments might have changed over the years, but polygraph evidence remains inadmissible in court. It is evident that the courts will continue along these lines. The judgments provide sufficient protection against polygraph testing, and there is no need to enact specific regulation. Polygraph evidence has been found admissible only in one legal arena: In respect of alleged child abuse, it was accepted in a few family law proceedings before the Regional Appeal Court (OLG) in the 1990s.<sup>215</sup> These cases did not however affect other parts of the law, especially employment law. In fact, it is expected that the divergent family court divisions will follow the BGH's most recent judgments of 1998 and 2003.

In particular, courts emphasise the examinee's fundamental rights to privacy and personal dignity. Initially those rights required a strict exclusion of polygraph evidence and courts did not even deal with the question of whether the polygraph is accurate. Courts refused to accept polygraph evidence even if it was the accused who wished to introduce the evidence as an attempt to escape conviction.<sup>216</sup> In 1954, the BGH held that polygraph evidence was inadmissible in court because it violated the right to human dignity.<sup>217</sup> In the case before the trial court, the prosecution had introduced polygraph evidence with the consent of the accused. The accused had failed the

examination and was convicted, also based on the results. The trial court violated the law of evidence in several respects: The court failed to discuss any possible technical defects or sources of error, and the examiner did not testify in court, so it was hearsay. The BGH also had objections because it found itself unable to assess the validity of the expert testimony. Therefore, the BGH quashed the decision of the regional court. Human dignity is guaranteed in article 1(1) of the Basic Law (GG) as the fundamental constitutional right of the individual and binding objective principle of constitutional law. Constitutional rights also apply to criminal proceedings.<sup>218</sup> In terms of article 1(1) of the GG, the accused may not be degraded to a mere object of the trial. The accused must remain party to the proceedings.<sup>219</sup> In this respect, the court found that a polygraph examination 'revealed the psyche' of the accused and hence infringed his/her right to human dignity.<sup>220</sup> The admissibility of polygraph evidence did not depend on the accused's consent to take the test nor the technique's scientific accuracy and reliability. It was also irrelevant whether a technique or method was useful for crime investigation.<sup>221</sup>

The polygraph instruments measure several physiological responses of the autonomic nervous system, which are mainly outside the examinee's conscious control. The reactions are used to determine the emotional state of a person in response to the test questions. Consequently, the BVerfG held in 1981 that polygraph testing violated the examinee's constitutional right to personality.<sup>222</sup> Article 2 of the GG protects the general freedom of action, which includes the right to bodily integrity in article 2(2)(1) and the general right to personality in article 2(1), which must be read together with article 1(1). Bodily integrity of a person, namely his/her physical and psychological health, must be protected against any adverse impact and intervention may only take place where law allows it. Some polygraph examinees experience the pressure from the blood pressure cuff as painful. The right to personality also prohibits any form of indignity according to article 2(1) of the GG, which must be read together with article 1(1), the right to human dignity. Polygraph testing aims to detect the examinee's emotional state, namely, whether he/she is truthful or deceptive. The right to personality protects the privacy of a person and includes inner thoughts and emotions, which may not be revealed under any circumstances. In particular, the right to privacy is protected against any intervention, even on a statutory basis. The right cannot be waived at any time of the proceeding.<sup>223</sup> A person may decide whether and how to answer to a question. In polygraph testing, however, the examinee cannot control the physiological responses.<sup>224</sup> Therefore, both the BVerfG and the BGH held that polygraph testing violated the right to personality.<sup>225</sup> In particular, the BVerfG argued that the accused became the 'bare appendix of an apparatus', hence a mere object of the proceedings.<sup>226</sup> The test would reveal a person's emotional state based on the measured automatic physiological reactions, which would otherwise not be visible. The testimony was therefore no longer the examinee's very own contribution. Articles 2(1) and 1(1) restrict the truth-finding in criminal proceedings.<sup>227</sup> Consistent with the BGH's judgment of 1954, lower courts refused to admit polygraph evidence.<sup>228</sup> Courts are also not obliged to admit polygraph evidence that was submitted by the accused to escape conviction. According to article 103(1) of the GG, the accused 'has the right to be heard in court'. However, article 103(1) of the GG does not give a person the right to submit

certain evidence. The admissibility of evidence is subject to the law of procedure and is in the discretion of the trial court.<sup>229</sup>

The more recent approach of the BGH (in 1998 and 2003) is that the examinee's constitutional rights make it necessary to consider the issue, particularly since it is the accused in the majority of the cases who wishes to introduce the evidence to escape conviction. Further, constitutional rights are not violated if the accused has consented to undergo the test.<sup>230</sup> However, the results are not admissible due to the lack of accuracy, despite being conducted by qualified psychologists. The BGH held that the results are not admissible as exculpatory evidence in both criminal and civil proceedings because they produce absolute inadequate evidence (section 244(3)(2) of the Code of Criminal Procedure). In the case at issue, the evidence's scientific proof, which was deemed irrelevant in the past, was considered with the assistance of several expert opinions. In 1954, the BGH had legal objections to the introduction of polygraph evidence whereas in 1998, it had factual objections.<sup>231</sup> Particularly, the court found in 1998 that both the CQT and the GKT produce completely inadequate evidence for the following reasons:<sup>232</sup> First, the theory behind the CQT is naive as there is no specific lie response. Secondly, there is no empirical proof: Laboratory experiments have no probative value, and field research faces the problem of sampling bias and lacks an independent criterion. Thirdly, even if empirical research shows high accuracy rates, it cannot confirm the accuracy of an individual test. Moreover, countermeasures might affect the test. Although the GKT is based on a more plausible theory, it lacks empirical proof. The court found that it provided inadequate evidence at the time of the trial because the accused had already gained detailed knowledge of the crime, since the law of criminal procedure (StPO) requires the police to inform the accused promptly and comprehensively of the charge against him/her (section 136(1)(1) of the StPO). Moreover, in its 1998 judgment the BGH rejected polygraph evidence irrespective of whether it served an inculpatory or exculpatory purpose.

In terms of section 244(4)(1) of the StPO, the court may reject expert evidence if the court possesses the necessary knowledge of the subject matter. An expert must confine himself/herself to the scientific elements of the case.<sup>233</sup> The expert may not give his/her opinion about the legal or general merits of the case, such as the assessment of a witness's credibility, unless there is an indication that a witness is mentally ill and therefore not capable of giving evidence. In this regard, the court's knowledge might not be sufficient to assess the credibility. The expert then assesses the impact of the witness' illness on his/her capability to give evidence.<sup>234</sup> An expert may also assess, for instance, the credibility of a very young witness as it is believed to be difficult in this case to receive a statement that is based on mere facts and hence of probative value to the case.<sup>235</sup> Otherwise, the assessment of the evidence constitutes an ultimate issue and is the task of the court alone. The court assesses all available evidence and, in the case of contradicting evidence, explains why it gives preference to one statement.<sup>236</sup> The expert opinion is also subject to the court's assessment. The court may not merely adopt an expert opinion but must reach its own conclusion.<sup>237</sup> The court decides whether it accepts an expert's opinion after considering whether the opinion is logical and substantive.<sup>238</sup>

Finally, looking at the employment context, law must require the administration of psychological and medical testing of employees and job applicants. A qualified psychologist or physician must also conduct the examination.<sup>239</sup> Comprehensive personality tests are not allowed. Any test or examination requires the explicit consent of the employee or job applicant, even though the test will not affect his/her physical integrity. The employer must show a legitimate interest in the examination. Otherwise, the employee may refuse to give his/her consent without fearing any adverse disciplinary action. The situation of a job applicant is different because if he/she refuses to submit to testing he/she is not likely to be employed. However, the employer must also show a legitimate interest in the examination.<sup>240</sup> In terms of dismissal, the employer must show that the dismissal was related to the employee's conduct or capacity or was based on operational requirements in order to be fair (sections 1(2)(1) and 1(2)(4) of the Protection against Dismissal Act). However, polygraph evidence is not admissible in civil and labour court proceedings, and therefore the employer cannot discharge the onus of proof with the help of a polygraph test. There is only one relevant court case, decided by the Federal Labour Court (BAG) in 1998 which held that polygraph results were not admissible evidence.<sup>241</sup> In the case at issue, the employee was dismissed for misconduct, in particular on suspicion of sexual harassment, and sought to submit the outcome of a polygraph test which he passed. If an employee cannot refer to a polygraph examination, an employer may certainly not dismiss or discipline on the outcome of a test.

## **7. Conclusion**

Due to the inherent limitations of the underlying theory and the absence of quality field research on labour law cases, there is no scientific evidence to show how reliable and accurate polygraph testing is. People do not respond in the same way to stress. Some believe in the polygraph's accuracy while others do not. Not only lying causes changes in heart rate, respiration or increased sweating. Furthermore, only certain question formats can be used in the employment context, but these formats lack standardisation and objectivity. Particularly in the employment context, the polygraph's accuracy is over-estimated as it is confused with its efficacy.

Therefore, other jurisdictions exercise a great caution in the use of polygraph testing in employment. The ILO standards also indicate that employers should not administer such testing.

Despite continuing doubts about the polygraph's accuracy and its potential for unfair discrimination, the CCMA recognises:

[the employer's] need to protect itself against losses sustainable through acts of, for example, dishonesty and, in appropriate circumstances, a polygraph test might constitute the most effective, or one of the most effective methods of the employer's protecting its operational requirements'.<sup>242</sup>

Although dispute resolution bodies are cautious about polygraph evidence to some extent, applying test results as 'mere' corroborative factor does not solve the problem. Due to a high misclassification rate of innocent examinees, and in the absence of other evidence, polygraph test results are also used

rather as exculpatory evidence in foreign jurisdictions. In South Africa, the outcome serves mainly inculpatory purposes in dismissal disputes despite there being no other evidence to show misconduct.

Except for some provisions in the public sector, the use of polygraph testing is not regulated in South Africa. There are no restrictions on its administration in the workplace and therefore, employers can in fact require a polygraph test at any time for any reason. Case law does not confine its use in employment, but rather deals with assessing the weight of the submitted test results. Screening can be conducted without any restrictions. This encourages companies to rely even more on polygraph testing. In this regard, the EPPA helps to highlight some important issues, which are not addressed and therefore not standardised, despite the widespread administration of polygraph tests, such as the substantive and procedural requirements of testing, employee's rights, and examiners' licensing.

Employers should not use polygraph testing on their employees, and the results should not be admissible evidence in labour disputes. Regulations for polygraph testing are required to address the current extensive use and misuse in the employment sector, the lack of qualified examiners and the inconsistent treatment in labour disputes.

The current framework of South African employment law, in particular section 8 of the EEA, does not provide sufficient protection from polygraph testing as the section allows the use of psychological testing as long as the employer shows that such testing meets the requirements. Legislation, particularly chapter II of the EEA, which already addresses employee testing and applies to both current and prospective employees, must be amended to ensure better protection against polygraph examinations. Those statutes in public employment, which allow the use of polygraph testing, should be reconsidered. In this regard, it is stressed once again that polygraph testing is mainly used for pre-employment and periodic screening that are both barely accurate.

Employers need to protect their business against increasing crime. On the other hand, employees have certain fundamental rights which should not be ignored. In the employment context, consent is hardly ever present in the face of a possible loss of employment or economic need to find work. It also creates suspicion when an employee refuses to submit to polygraph testing whereas co-workers have agreed to undergo an examination. Decisions are made about people's livelihoods and careers based on a test that lacks accuracy. The employer should put its faith in other, more reliable measures.

## Endnotes

1. See *Sunday Times* (Business Times), 'Some polygraphists fail the test', at [www.btimes.co.za/97/0413/btmoney/money7.htm](http://www.btimes.co.za/97/0413/btmoney/money7.htm) (accessed on 27 September 2005).
2. See *Katyard, Prasuant v New Republic Bank – M Abel*, [1998] CCMA, KN11050; *NUM & Others v RSA Geological Services, a division of De Beers Consolidated Mines Ltd*, [2004] 25 ILJ 410 (ARB); *Cebekhulu, Vusumuzi v Grey Security – Donna Stevenson*, [2000] CCMA, KN43367; *SACCAWU v Sterns Jewellery*, [1997] CCMA, NP144; *Cape Times* on 27 September 2004: 'How you can become a courier'; *The Cape Argus* on 21 November 2005: 'Polygraph examiner "threatened to kick me"'; *Felix v Constantia Pharmacy (Pty) Ltd*, [2002] 4 BALR 418 (CCMA).
3. *Singh, Dhumal v First National Bank*, [1999] CCMA, KN33299; *Ally, Pier Ursula v C.N.A.*, [2000] CCMA, KN47787; *The Cape Argus* on 21 November 2005; *SACCAWU obo Sandi v Solly Kramer*, [1999] 10 BALR 1207 (CCMA); 'Guards end strike over lie-detector test', reported at [www.iol.co.za](http://www.iol.co.za) on 13 August 2002; *HOTELLICA Trade Union v San Angelo Spur (Rondebosch)*, [1997] CCMA, WE3799; *Mintcher, Steffhan v Sun City (Sun International) – Diana Buck*, [2001] CCMA, NW21252; *Metro Rail v SATAWU obo Makhubela*, [2000] 5 BALR 599 (CCMA); *SACCAWU obo Sydney Fongo v Pick 'n Pay Supermarket*, [2000] CCMA, FS15555; *Spoornet – Johannesburg v SARHWU on behalf of J S Tshukudu*, [1997] CCMA, GAAR002861; 'Lie detector test for SAA pilots', at [www.iol.co.za](http://www.iol.co.za) on 21 May 2000; 'Theme park axes senior staff', at [www.iol.co.za](http://www.iol.co.za) on 23 February 2000; *Van Zyl, Adele v Game*, [1999] CCMA, FS6652; *Harilall, Jayrajih v Clover SA*, [1998] CCMA, KN10750; *SACCAWU obo Masele v Makro SA*, [1999] CCMA, EC11554/5/8/9; *NUFBWSAW obo Mahlangu & Masango – Sello Baloyi v Stellenbosch Farmers' Winery*, [2000] CCMA, MP11082; *Kroutz v Distillers Corporation Ltd*, [1999] 8 BALR 912 (CCMA); *Shongwe v Siemens Ltd*, [2003] 24 ILJ 2434 (BCA); *Neil Mays v SA Post Office Limited*, [2003] 12 CCMA 8.23.6; *Amalgamated Pharmaceuticals Ltd v Grobel NO and others*, [2004] 25 ILJ 523 (LC); *Zulu v Morkels Stores (Pty) Ltd*, [2000] CCMA, KN4/022.
4. See, for instance, in *Smith v Canoa Eastern Cape*, [2000] 12 BALR 1436 (CCMA) and *SATAWU obo Lawrence Mabunda v Group 4 Falck (Pty) Ltd (Formerly Callguard Security Services)*, [2002] 11 CCMA 8.8.15, GA1264-02.
5. For instance, *Khumalo & another v Cash Paymaster Services*, [2003] 1 BALR 48 at 60 (CCMA); *Mvemve & Mahashe v Galaxy World/Evertrade 77 (Pty) Ltd*, [2003] 7 BALR 766 at 776 (BCI).
6. Iacono and Lykken, 'The scientific status of research on polygraph techniques: the case against polygraph tests', in Faigman, Kaye and Sanders (eds), *Modern Scientific Evidence: The Law and the Science of Expert Testimony* (1997), 582.
7. US National Research Council (2003), *The Polygraph and Lie Detection*, 12-13. The U.S. Department of Energy (DOE) requested the National Academy of Sciences in 2003 to assess the DOE's extensive use of polygraph testing to determine potential and actual security risks.

8. Raskin and Honts, 'The Comparison Question Test', in Kleiner (ed), *Handbook of Polygraph Testing*, 3.
9. Mitchell, 'The Pre-test Interview: A preliminary Framework', in Kleiner (ed), 183.
10. US National Research Council (2003), op. cit., 30.
11. Ibid. at 117 – 118.
12. Iacono and Lykken, op. cit., 589.
13. US National Research Council (2003), op. cit., 32.
14. Ibid. at 101.
15. De Clue, *The Journal of Psychiatry & Law* 31/Fall 2003, 365.
16. *Mallard v The Queen*, [2003] WASCA 296.
17. US National Research Council (2003), op. cit., 82.
18. See Christianson, 'Truth, lies and polygraphs: Detecting dishonesty in the workplace', [1998] 8 : 1 *CLL* 1 at 3.
19. Anastasi and Urban, *Psychological Testing*, 7.
20. Kircher and Raskin in Kleiner (ed), op. cit., at 310, Table 11.1.
21. Cilliers and Martin, 'Utilisation of the polygraph in the criminal justice system (2)', *Acta Criminologica* 16(1) 2003, 94 at 104.
22. Statement by PASA, reported on 28 June 2001 (IR network).
23. The GKT is also called the Concealed Information Test (CIT).
24. Raskin, Honts and Kircher, 'The scientific status of research on polygraph techniques: the case for polygraph tests', in Faigman, Kaye and Sanders (eds), *Modern Scientific Evidence: The Law and the Science of Expert Testimony* (1997), 565 – 582, 583.
25. Iacono and Lykken, op. cit., 584.
26. Raskin, Honts and Kircher, op. cit., 567.
27. Iacono and Lykken, op. cit., 584.
28. Raskin, Honts and Kircher, op. cit., 567 – 568.
29. The MGQT is used for specific investigations as well as screening purposes. The examiner can ask multi-issue relevant questions. The MGQT is based on the same inherent limited theory as the CQT. There is also no clear difference between relevant and control questions. Therefore, innocent examinees might be more concerned about the relevant questions, guilty examinees more about control questions (OTA, chapter 2: Varieties of Polygraph Testing and Uses, at [www.fas.org/sgp/othergov/polygraph/ota/varieties.html](http://www.fas.org/sgp/othergov/polygraph/ota/varieties.html); accessed on 6 March 2006).
30. The application of the ZCT is restricted to investigations into specific crime or misconduct. The comparison questions are too specific, increasing the risk of false positive errors. The outside issue questions have no considerable impact on the accuracy of the test. The ZCT also lacks scientific evidence.
31. Kleiner, 'Physiological Detection of Deception in Psychological Perspectives: A Theoretical Proposal', in Kleiner (ed), 128.
32. Tredoux and Pooley, [2001] 22 *ILJ* 819 at 828; *Mallard v The Queen*, [2003] WASCA 296.
33. See Kleiner in Kleiner (ed), op. cit., 128.
34. *Mallard v The Queen*, [2003] WASCA 296.
35. US National Research Council (2003), op. cit., 35 and 70.
36. Iacono and Lykken, op. cit., 611.
37. Ben-Shakhar and Elaad in Kleiner (ed), op. cit., 93.

38. Raskin, Honts and Kircher, op. cit., 576; Ben-Shakhar and Elaad in Kleiner (ed), op. cit., 93.
39. See Raskin, Honts and Kircher, op. cit., 575 (table 2).
40. US National Research Council (2003), op. cit., 80.
41. Ibid. at 2.
42. Ben-Shakhar in Kleiner (ed), op. cit., 121.
43. US National Research Council (2003), op. cit., 57.
44. Ibid. at 31.
45. Ibid. at 132; The Council concluded that the studies are biased because they ignored mostly true positives and false positive errors.
46. Statement by PASA, reported on 14 July 1999 (IR network).
47. Tredoux and Pooley, 'Polygraph based testing of deception and truthfulness: An evaluation and commentary', [2001] 22 *ILJ* 819 at 821.
48. See at [www.griffithsonline.co.za/media/clippings/mw08052004.htm](http://www.griffithsonline.co.za/media/clippings/mw08052004.htm) (accessed on 27 September 2005)
49. See *Sunday Times* (Business Times), at [www.btimes.co.za/97/0413/btmoney/money7.htm](http://www.btimes.co.za/97/0413/btmoney/money7.htm) (accessed on 27 September 2005).
50. Cilliers and Martin (2003), op. cit., 94 – 95.
51. See, for instance, at [www.polygraph.co.za](http://www.polygraph.co.za), [www.polygraph-sa.co.za](http://www.polygraph-sa.co.za), [www.honesty.co.za](http://www.honesty.co.za), [www.polyservice.co.za](http://www.polyservice.co.za), [www.polygraphservices.co.za](http://www.polygraphservices.co.za), [www.polygraphy.co.za](http://www.polygraphy.co.za), [www.forensicinvestigation.co.za](http://www.forensicinvestigation.co.za) (all accessed on 23 April 2007).
52. *Simani v Coca-Cola Furtune*, [2006] 10 *BALR* 1044 (CCMA); *NUFBWSAW obo Mahlangu & Masango – Sello Baloyi v Stellenbosch Farmers' Winery*, [2000] CCMA, MP11082.
53. For instance, *Mzimela v United National Breweries SA (Pty) Ltd*, [2005] 9 *BALR* 969 at 980 (CCMA).
54. *Sosibo & others v Ceramic Tile Market*, [2001] 22 *ILJ* 811 at 817 (CCMA).
55. *Steen v Wetherlys (Pty) Ltd*, [2005] CCMA, KNDB5462-05.
56. *NUMSA obo Masuku v Marthinusen & Coutts*, [1998] 9 *BALR* 1170 at 1171 (CCMA).
57. *SACCAWU obo Sydney Fongo v Pick 'n Pay*, [2000] CCMA, FS15555.
58. Schwikkard and Van der Merwe, *Principles of Evidence*, 49.
59. Zeffertt, Paizes and Skeen, *The South African Law of Evidence*, 290 – 291.
60. *Cooper (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung Mbh*, 1976 (3) *SA* 352 (A) at 370.
61. For instance, *Mncube v Cash Paymaster Services (Pty) Ltd*, [1997] 5 *BLLR* 639 at 641 (CCMA); *SACCAWU obo Chauke v Mass Discounters*, [2004] 6 *BALR* 767 at 778 (CCMA).
62. Zeffertt, Paizes and Skeen, op. cit., 299.
63. *Mahlangu v CIM Deltak, Gallant v CIM Deltak*, [1986] 7 *ILJ* 346 at 346 (IC).
64. For instance, *Mncube v Cash Paymaster Services (Pty) Ltd*, [1997] 5 *BLLR* 639 (CCMA); *Mvemve & Another v Evertrade 77 (Pty) Ltd*, [2003] 7 *BALR* 766 (BCI).
65. *Mahlangu v CIM Deltak, Gallant v CIM Deltak*, [1986] 7 *ILJ* 346 at 351 (IC).

66. *Sosibo & others v Ceramic Tile Market*, [2001] 22 ILJ 811 at 817 (CCMA).
67. *Steen v Wetherleys (Pty) Ltd*, [2005] CCMA, KNDB5462-05.
68. See, for instance, *Mzimela v United National Breweries SA (Pty) Ltd*, [2005] 9 BALR 969 at 980 (CCMA).
69. *PETUSA obo Van Schalkwyk v National Trading Co*, [2000] 21 ILJ 2323 at 2327 (CCMA).
70. Media statement by the Professional Board for Psychology on 2 July 1999: 'Legal and illegal use of psychometric tests including the polygraph'
71. For instance, in *PETUSA obo Van Schalkwyk v National Trading Co*, [2000] 21 ILJ 2323 at 2332 (CCMA); *Mncube v Cash Paymaster Services (Pty) Ltd*, [1997] 5 BLLR 639 at 641 (CCMA); *Zoned & one other v Floccotan (Pty) Ltd*, [1997] CCMA, KN2845; *Mbele v Cash Payment Services (Pty) Ltd*, [1997] CCMA, KN4084; *NUMSA obo Qhusheka v Alloy Wheels International*, [2000] CCMA, EC17665; *Rix v Ryder Security (Pty) Ltd* [1994] 3 LCD 68 at 69 (IC); *Singh, Dhumal v First National Bank*, [1999] CCMA, KN33299.
72. *Mudley v Beacon Sweets & Chocolates*, [1998] CCMA, KN10527; *Pillay, Vincent v National Brands*, [1998] CCMA, KN15700; *Themba & Luthuli v National Trading Company*, [1998] CCMA, KN16887; *Mnguni, Zepjania v Oryx Security*, [1998] CCMA, KN17731; *Kroutz v Distellers Corporation Ltd*, [1999] 8 BALR 912 at 917 (CCMA).
73. *Singh, Dhumal v First National Bank*, [1999] CCMA, KN33299.
74. *Steen v Wetherleys (Pty) Ltd*, [2005] CCMA, KNDB5462-05.
75. *SACCAWU obo Sydney Fongo v Pick 'n Pay Supermarket*, [2000] CCMA, FS15555 (own emphasis).
76. *Mncube v Cash Paymaster Services (Pty) Ltd*, [1997] 5 BLLR 639 at 643 (CCMA): 'Why she responded in the way that she did falls squarely within ambit of the expertise of trained psychologists, which Mr. Roberts is not. In any event a psychologist would merely be able to assess the probabilities without making a categorical finding as to whether she was lying.'
77. For instance, *SACCAWU obo Chauke and Mass Discounters*, [2004] 6 BALR 676 (CCMA).
78. *Josanan v Mac Steel VRN*, [2004] 5 BALR 566 at 570 (MEIBC).
79. Phipson on Evidence, 37-12; Sendler, 'Richter und Sachverständige', *NJW* 1986, 2907 at 2908.
80. Schwikkard and Van der Merwe, op. cit., 49.
81. See IR network, 'Fired diamond sorter will see mining firm in labour court', reported on 18 June 1999; *Cunningham v Benguala Operations (Pty) Ltd* (1999) C542/98 (LC). The case was however settled by the company.
82. *Mahlangu v CIM Deltak, Gallant v CIM Deltak*, [1986] 7 ILJ 346 at 357 (IC); *Mahlo v Bolt & Engineering Distributors*, [2006] 11 BALR 1116 at 1116 (CCMA).
83. *Mahlangu v CIM Deltak, Gallant v CIM Deltak*, [1986] 7 ILJ 346 at 346 (IC).
84. For instance, in *Malgas v Stadium Security Management*, [1999] 8 BALR 919 (CCMA); *NUMSA obo Masuku v Marthinusen & Coutts*, [1998] 9 BALR 1170 (CCMA); *Ndlovu v Chapelat Industries (Pty) Ltd*, [1999] 8 BALR 996 (IMSSA); *Geni v Ceramic Tile Market*, [1999]

- CCMA, EC 10121; *Buang v Morkels Store*, [2001] CCMA, NC6585; *SACCAWU obo Chauke v Mass Discounters*, [2004] 6 BALR 767 (CCMA); *Mvemve & Another v Evertrade 77 (Pty) Ltd*, [2003] 7 BALR 766 (BCI); *ECCAWUSA obo Rosy Nhlapo - Siphso Busakwe v Miladys - Anna Hoodhouse*, [1998] CCMA, GA30036.
85. See, for instance, *Felix v Constantia Pharmacy (Pty) Ltd*, [2002] 4 BALR 418 at 424 (CCMA); *CWIU obo Frank v Druggist Distributors (Pty) Ltd*, [1998] 12 BALR 1573 at 1578 (CCMA).
  86. See, for instance, *Mzimela v United National Breweries SA (Pty) Ltd*, [2005] 9 BALR 969 at 980 (CCMA).
  87. *PETUSA obo Van Schalkwyk v National Trading Co*, [2000] 21 ILJ 2323 (CCMA).
  88. *Ibid.* at 2330 and 2324 (CCMA).
  89. See, for instance, *NUMSA obo Mkhonza & Others v Assmang Chrome Machadodorp Works*, [2005] 14 MEIBC 2.11.1, MEGA NHN11/2/10237; *Harmse v Rainbow Farms (Pty) Ltd*, [1997] CCMA, WE1728.
  90. De Waal et al, *The Bill of Rights Handbook*, 324.
  91. *NUMSA obo Nqukwe & Others v Lowveld Implement & Farm Equipment (Life)*, [2003] 8 BALR 909 at 914 (CCMA); author's emphasis.
  92. Grogan, *Workplace Law*, 57.
  93. *Meth, LC v Avscan International Consultants – JJ van Zyl*, [2001] CCMA, GA118598.
  94. *Harmse v Rainbow Farms (Pty) Ltd*, [1997] CCMA, WE1728.
  95. Christianson, [1998] 8 : 1 CLL 1 at 10.
  96. The EPPA will be discussed more detailed below.
  97. *Jacob, Paul Keith v Unitrans Engineering*, [1999] CCMA, KN21921; *Kroutz v Distellers Corporation Ltd*, [1999] 8 BALR 912 at 917 (CCMA); *SACCAWU obo Masele v Makro SA*, [1999] CCMA, EC11555; *Naidoo v Tiletoria Cape CC*, [2001] 6 BALR 622 at 627 (CCMA); *Nthani v ABI Limited*, [2002] 12 BALR 1310 at 1314 (CCMA).
  98. *Mnguni, Zepjania v Oryx Security*, [1998] CCMA, KN17731.
  99. *Armoed, Elton K v Gray Security Services*, [1999] CCMA, EC9809.
  100. *Chad Boonzaier v HICOR Trading Ltd*, [1999] CCMA, WE18745.
  101. *HOTELLICA Trade Union v San Angelo Spur*, [1997] CCMA, WE3799.
  102. *CEPPWAWU obo W A Francis v Thermopac*, [2000] CCMA, WE33153.
  103. *NUMSA obo Goliath & another v Shelco Shelving*, [2003] 5 BALR 587 at 587 (CCMA).
  104. See, for instance, *Lefophana v Vericon Outsourcing*, [2006] 15 CCMA 7.1.7, GAPT 9884-05.
  105. So decided in *SATAWU obo Lawrence Mabunda v Group 4 Falck (Pty) Ltd (Formerly Callguard Security Services)*, [2002] 11 CCMA 8.8.15, GA1264-02.
  106. Item 7 of schedule 8 of the LRA.
  107. *Lefophana v Vericon Outsourcing*, (2006) 15 CCMA 7.1.7, GAPT9884-0.
  108. Du Toit et al, *Labour Relations Law*, 481.
  109. *SEAWU obo Mdhluli v Controlled Chatterbox Services CC*, [2001] CCMA, GA121311.
  110. Sections 3(a) and (b) of the EEA.

111. Green Paper on Employment and Occupational Equity, Gazette No. 17303, Notice No. 804, 01 July 1996, 35.
112. Gazette No. 18481, Notice No. 1840, 01 December 1997.
113. Employment Equity Bill, B60-98.
114. Employment Equity Bill, B60A-98 and B60B-98.
115. Labour Portfolio Committee, Discussion on the Employment Equity Bill, 4 August 1998.
116. See Mauer, *Psychological Test and Other Similar Assessment Device Classification and Use in South Africa*, at [www.pai.org.za/board.htm](http://www.pai.org.za/board.htm) (accessed on 29 December 2005).
117. Muchinsky et al, *Personnel Psychology*, 1.
118. Bonthuys, 'Psychometric Testing and the Law', [2002] 23 *ILJ* 1175 at 1175-1176.
119. Regulations to the Intelligence Service Act 65 of 2002 issued in terms of its section 37.
120. Anastasi and Urbina, *op. cit.*, 4.
121. Christianson, 'Polygraph testing in South African Workplaces: "Shield and sword" in the dishonesty detection versus compromising privacy debate', [2000] 21 *ILJ* 16 at 27.
122. Raskin and Honts, 'The Comparison Question Test', in Kleiner (ed), *Handbook of Polygraph Testing*, 1.
123. *Mahlangu v CIM Deltak*, [1986] 7 *ILJ* 346 at 351 (IC).
124. Section 37 of the HPA.
125. Du Toit et al, *op. cit.*, 620.
126. HPCSA, Form 207, 'Why do we classify tests'.
127. Board's e-mail of 16 November 2005.
128. Media statement by the Professional Board for Psychology on 2 July 1999: 'Legal and illegal use of psychometric tests including the polygraph'.
129. *PETUSA obo Van Schalkwyk v National Trading Co*, [2000] 21 *ILJ* 2323 at 2331 - 2332 (CCMA).
130. *Ibid.* at 2327.
131. *Ibid.* at 2328.
132. *Ibid.* at 2331.
133. *Ibid.*
134. Christianson, [2000] 21 *ILJ* 16 at 36.
135. Christianson, 'The testing of employees: The selective prohibition of medical, psychological and other testing in terms of the Employment Equity Act', [1999] 9 : 2 *CLL* 11 at 16; Christianson, [2000] 21 *ILJ* 16 at 37.
136. *Mvemve & Another v Evertrade 77 (Pty) Ltd*, [2003] 7 *BALR* 766 (BCI).
137. HPCSA, Form 207, 3.
138. *Ibid.* at 2.
139. Section 11 of the EEA.
140. Du Toit et al, *op. cit.*, 620.
141. Bonthuys, *op. cit.*, 1188 – 1189.
142. Dupper et al, *Essential Employment Discrimination Law*, 219.
143. Servais, *International Labour Law*, 19.
144. Section 39(1) of the South African Constitution, sections 1 and 3 of the Labour Relations Act 66 of 1995, section 3(d) of the Employment Equity Act 55 of 1998.
145. Servais, *op. cit.*, 63.

146. Article 7 of the 1948 Universal Declaration of Human Rights; Article 26 of the 1966 Covenant on Civil and Political Rights; Regional instruments: Articles 2 and 3 of the 1981 African Charter on Human and People's Rights; Article 14 of the 1950 European Convention on Human Rights; Article 4(3) of the 1961 European Social Charter (ESC); Article 1 of the European Union Council Directive 2000/78/EC; Article 24 of the 1969 American Convention on Human Rights and Articles 3 and 7(a) of the 1988 Additional Protocol to the American Convention on Human Rights. For more information, see Waas, *The Legal Consequence of Discrimination against Workers in Germany, the European Union and the Council of Europe*, 63 - 146.
147. Article 24 of the ESC.
148. For instance, the Council of Europe adopted the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data in 1981.
149. Valticos, *International Labour Law*, 49.
150. Du Toit et al, op. cit., 577.
151. Grogan, *Workplace Law*, 264.
152. Ibid.
153. Ibid. at 277.
154. Du Toit et al, op. cit., 576.
155. Servais, op. cit., 148.
156. Du Toit et al, op. cit., 577.
157. Ibid. at 605.
158. *Harksen v Lane*, 1998 (1) SA 300 at 322 (CC); *Ntai & Others v SA Breweries Ltd*, [2001] 22 ILJ 214 at 227 (LC).
159. Dupper et al, op. cit., 65.
160. Section 9 of the EEA.
161. Du Toit et al, op. cit., 619.
162. Van Niekerk, 'Discrimination in selection and recruitment: An applicant's right to equality of treatment', [1995] Vol. 4 No. 10 *CLL*, 105 at 111.
163. Americans with Disability Act of 1990 (42 USC 12112).
164. Halbach et al, *Labour Law in Germany*, 50.
165. Grogan, op. cit., 281.
166. *Polkey v Transtecs Corporation*, 404 F.3d 1264 (11th Cir. 2005); *CEPPWAWU obo W A Francis v Thermopac*, [2000] CCMA, WE 33153.
167. ILO, General Survey by the Committee of Experts (1995), Protection against Unjustified Dismissal: Obligation for termination of employment to be justified by a valid reason, at [www.ilo.org/ilolex/english/iloquery.htm](http://www.ilo.org/ilolex/english/iloquery.htm) (accessed on 01 June 2006).
168. For instance, in *Govender v Container Services*, [1997] CCMA, KN4881; *Singh, Dhupal v First National Bank*, [1999] CCMA, KN33299.
169. ILO, General Survey by the Committee of Experts (1995), Protection against Unjustified Dismissal: Obligation for termination of employment to be justified by a valid reason, at [www.ilo.org/ilolex/english/iloquery.htm](http://www.ilo.org/ilolex/english/iloquery.htm) (accessed on 02 June 2006).
170. For instance, in *Mnguni, Zepjania v Oryx Security*, [1998] CCMA, KN17731 and *Jacob, Paul Keith v Unitrans Engineering*, [1999] CCMA, KN21921 as opposed to for instance *Armoed, Elton K v Gray*

- Security Services*, [1999] CCMA, EC9809 where refusal was considered as an indication of guilt.
171. Basson et al, *Essential Labour Law*, 150.
  172. Servais, op. cit., 98.
  173. See ILO Code of Practice on the protection of workers' personal data of 1997, purpose in clause 2.
  174. Commentary on the Code, at [www.ilo.org/public/english/protection/condtrav/pdf/wc-code-97.pdf](http://www.ilo.org/public/english/protection/condtrav/pdf/wc-code-97.pdf), 9 (accessed on 02 November 2006).
  175. Preamble of the ILO Code of Practice on the protection of workers' personal data.
  176. Clause 3.1 of the ILO Code of Practice.
  177. Commentary on the Code, at [www.ilo.org/public/english/protection/condtrav/pdf/wc-code-97.pdf](http://www.ilo.org/public/english/protection/condtrav/pdf/wc-code-97.pdf), 10 (accessed on 02 November 2006).
  178. Commentary on the Code, op. cit., 14.
  179. Ibid.
  180. So happened, for instance, in *Govender and Chetty v Container Services*, [1997] CCMA, KN 4881.
  181. See Roth, 'The International Labour Office code of practice on the protection of workers' personal data', [1998] *PLPR* 33, see at [www.austlii.edu.au/au/journals/PLPR/1998/33.html](http://www.austlii.edu.au/au/journals/PLPR/1998/33.html) (accessed on 26 January 2005).
  182. Ibid.
  183. Ibid.; Paragraph 36 of the *Report of the Meeting of Experts on Workers Privacy* (MEWP/1996/5), Geneva, 1-7 October 1996.
  184. Report of the Meeting of Experts on Workers' Privacy (Geneva 1996), see at [www.ilo.org/public/english/standards/relm/gb/docs/gb267/gb-6.htm](http://www.ilo.org/public/english/standards/relm/gb/docs/gb267/gb-6.htm) (accessed on 10 October 2006).
  185. Servais, op. cit., 98.
  186. Roth, op. cit.; *The ILO, Standard Setting and Globalization: Report of the Director General*, International Labour Conference, 85th Session (Geneva 1997), 35-48.
  187. Simitis, 'ILO Code wants stronger protection of employee data', [1998] *Privacy Laws and Business International Newsletter* 21, at [www.worldlii.org/int/journals/PLBIN/1998/21.html](http://www.worldlii.org/int/journals/PLBIN/1998/21.html), accessed on 30 November 2005.
  188. European Treaty Series No. 108, Strasbourg, 1981.
  189. The Recommendation No. R (89) 2 of the Committee of Ministers to Member States on the Protection of Personal Data used for Employment Purposes.
  190. There are other Directives, which address data protection in specific sectors: the Directive 97/66/EC of 15 December 1997, concerning the processing of personal data and the protection of privacy in the telecommunications sector and the Directive 2002/58/EC of 12 July 2001, concerning the processing of personal data and the protection of privacy in the electronic communications sector.
  191. For instance, the U.S. Department of Energy (DOE), the Department of Defense (DOD), the Federal Bureau of Investigation (FBI) and the Central Intelligence Agency (CIA).
  192. For instance, in *Mahlangu v CIM Deltak*, *Gallant v CIM Deltak*, [1986] 7 ILJ 346 at 353 (IC); *Mncube v Cash Paymaster Services*, [1997] 5

- BLLR* 639 at 643 (CCMA); *PETUSA obo Van Schalkwyk v National Trading Co*, [2000] 21 *ILJ* 2323 at 2332 (CCMA); *Sosibo & others v Ceramic Tile Market*, [2001] 22 *ILJ* 811 at 817 (CCMA).
193. Koontz Sening, 'Heads or Tails: The Employee Polygraph Protection Act', [1989] 39 *Cath. U.L. Rev.* 235 at 235.
  194. *Ibid.* at 235 and 236.
  195. University of Virginia Law School, at [www.lawnotes4.law.virginia.edu/pells/employment%20law%204.nsf/719d4a582e96e615852567490077634b/b3a36d8bda0ec239852568cd005b5d24?OpenDocument](http://www.lawnotes4.law.virginia.edu/pells/employment%20law%204.nsf/719d4a582e96e615852567490077634b/b3a36d8bda0ec239852568cd005b5d24?OpenDocument) (accessed on 24 January 2006).
  196. Koontz Sening, *op. cit.*, 237.
  197. Chin, 'Protecting employees and neglecting technology assessment: The Employee Polygraph Protection Act of 1988', [1990] 55 *Brooklyn L. Rev.* 1315 at 1328.
  198. *Swope v Florida Industrial Commission Unemployment Compensation Board of Review*, 159 So.2d 653 at 654 (District Court of Appeal of Florida, 1964): In the present case, the employee had claimed unemployment compensation. The court held that the refusal did not constitute misconduct in terms of the Unemployment Compensation Act.
  199. See *Wiltshire v Citibank*, 653 N.Y.S.2d 517 at 519 (Supreme Court of New York, 1996).
  200. The court in *Mennen v Easter Stores*, 951 F. Supp. 838 at 851 stated that 'apparently persuaded by the employer/polygraph proponents' argument that the threat of a polygraph examination would serve as a deterrent to employee theft in the workplace, Congress allowed a narrow exception to the statutory protection'.
  201. Section 801.4(b) of the Department of Labour regulation 29 CFR 801: The purpose of the Department of Labour regulations 29 CFR 801 was to carry out the provisions of the EPPA (section 801.1(a); interpretation of the provisions).
  202. *Mennen v Easter Stores*, 951 F. Supp. 838 (N.D. Iowa, 1997).
  203. *Polkey v Transtecs Corporation*, 404 F.3d 1264 at 1270 (11th Cir. 2005).
  204. The court stated in *Mennen v Easter Stores*, 951 F. Supp. 838 at 857 (N.D. Iowa, 1997) that 'while in one sense one can hardly fault Easter for waiting for the results of the polygraph examination, ostensibly wanting the assurances of a polygraph test rather than relying on mere suspicion, this is a choice Congress clearly foreclosed when it passed the EPPA'. Further at 856 it is said that 'the irony of this case ... is that Easter could have discharged Mennen, prior to any polygraph examination, simply based upon a mere suspicion that he committed the theft'.
  205. For example, *Fallin v Mindis Metals, Inc.*, 865 F.Supp. 834 (N.D. Georgia, 1994); *Rubin v Tourneau, Inc.*, 797 F.Supp. 247 (S.D.N.Y.1992); *Calbillo v Cavender Oldsmobile, Inc.*, 288 F.3d 721 (5th Cir. 2002); *Watson v Drummond Co.*, 2006 U.S. App. LEXIS 1352 (11th Cir. 2006).
  206. *Mennen v Easter Stores*, 951 F. Supp. 838 (N.D. Iowa, 1997); *Polkey v Transtecs Corporation*, 404 F.3d 1264 (11th Cir. 2005).
  207. *Burton v Gerland's Food Fair, Inc.*, 1998 Tex. App. LEXIS 7672 (Texas, 1998): The employee was charged with theft of money. During

- the polygraph exam, the employee refused to answer to the test questions. She was dismissed for violating a store policy and for failing to co-operate in the investigation of the theft.
208. *Daubert v Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).
  209. *Frye v U.S.*, 293 F. 1013 (1923).
  210. *Daubert v Merrell Dow Pharmaceuticals*, 509 U.S. 579 at 580 (1993).
  211. Cornell University, *Federal Rules of Evidence*, at [www.law.cornell.edu/rules/fre/ACRule702.htm](http://www.law.cornell.edu/rules/fre/ACRule702.htm) (accessed on 04 April 2006).
  212. BGH, *JR* 1999, 379; BGH, 24 June 2003 – VI ZR 327/02.
  213. BAG, *NZA* 1998, 670.
  214. BVerfG, *NJW* 1982, 375.
  215. For instance, OLG Bamberg, *NJW* 1995, 1684.
  216. *BGHSt* 5, 332.
  217. *Ibid.*
  218. *Ibid.*
  219. *Ibid.*
  220. *Ibid.* at 335.
  221. *Ibid.* at 332.
  222. BVerfG, *NJW* 1982, 375.
  223. LG Wuppertal, *NStZ-RR* 1997, 75 at 76.
  224. *BGHSt* 5, 332 at 335.
  225. BVerfG, *NJW* 1982, 375; BGH, *NJW* 1999, 662 at 662.
  226. BVerfG, *NJW* 1982, 375 at 375.
  227. *Ibid.*
  228. For instance, OLG Frankfurt, *NStZ* 1988, 425; LG Wuppertal, *NStZ-RR* 1997, 75; OLG Karlsruhe, *StV* 1998, 530; LG Düsseldorf, *StV* 1998, 647.
  229. BVerfG, *NStZ* 1998, 523 at 524.
  230. BGH, *JR* 1999, 379.
  231. Stalinski, *Aussagefreiheit und Geständnisbonus*, 83.
  232. BGH, *JR* 1999, 379 at 380-382.
  233. Freckelton and Selby, *The Law of Expert Evidence*, 252.
  234. Pfeiffer, *Strafprozessordnung und Gerichtsverfassungsgesetz*, § 244 Para. 42.
  235. Gesellschaft für wissenschaftliche Gerichts- und Rechtspsychologie, at [www.gwg-institut.com](http://www.gwg-institut.com) (accessed on 5 May 2006).
  236. BAG, *NJW* 1970, 880 at 880.
  237. BGH, *NJW* 1989, 2948.
  238. Rosenberg et al, *Zivilprozessrecht*, § 120 Para. 65.
  239. Halbach et al, *op. cit.*, 50.
  240. Dieterich et al, *Erfurter Kommentar*, Art. 2 Para. 93.
  241. BAG, *NZA* 1998, 670 at 670.
  242. *NUMSA obo Nqukwe & Others v Lowveld Implement & Farm Equipment (Life)*, [2003] 8 *BALR* 909 at 908 (CCMA).

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