

# Employment Law

ALERT | 29 September 2025



## In this issue

### SOUTH AFRICA

- Are polygraph tests still useful in employment disputes?
- Lessons on dismissal for incapacity due to ill-health



For more insight into our  
expertise and services

EMPLOYMENT LAW  
ALERT

## Are polygraph tests still useful in employment disputes?

In the recent case of *Poggenpoel and Another v Commission for Conciliation, Mediation and Arbitration and Others (C253/2022) [2025] ZALCCT 69 (1 September 2025)*, the Labour Court dealt with, among other things, the employer's reliance on its employees' refusal to be subjected to polygraph tests to justify their dismissal.



## Facts

Two long-serving managers of a retail and wholesale chicken business were dismissed after being accused and found guilty of, among others, theft or collusion to commit theft of cash from an ABSA ATM at their workplace. The employer relied on ATM reconciliation sheets, ticket history and CCTV footage, as well as the employees' refusal to undergo polygraph testing, to justify the dismissals of the two employees. The employees challenged the dismissals at the Commission for Conciliation, Mediation and Arbitration (CCMA). The commissioner upheld the dismissals as substantively and procedurally fair. The employees then brought a review application to the Labour Court.



## The law

It is common for polygraph tests to be administered to employees as part of workplace investigations into misconduct. The scientific reliability of polygraph tests remains contested, and they must be approached with caution when used in disciplinary or arbitration proceedings. The courts have consistently cautioned that polygraph results have limited probative value, and adverse inferences may only be drawn under appropriate circumstances, particularly where an employee refuses to undergo a polygraph test when they are contractually obliged to do so.

In *DHL Supply Chain (Pty) Ltd v De Beer NO and Others (DA4/2013) [2014] ZALAC 15; [2014] 9 BLLR 860 (LAC); (2014) 35 ILJ 2379 (LAC)* (13 May 2014), the Labour Appeal Court found that the inference to be drawn from the failure of the polygraph test is only useful as material to determine probabilities. Without expert evidence explaining what the inference is to be drawn from a failed polygraph test, and justification for such an inference, there is nothing useful in assisting with probabilities.

## Are polygraph tests still useful in employment disputes?

CONTINUED



### Application of law to the facts

In line with the long-established test on review, The Labour Court had to determine whether the award was one that a reasonable commissioner could have arrived at on the evidence properly before him. The Labour Court found that the commissioner committed a material error of law by drawing an adverse inference from the employees' refusal to take polygraph tests.

It was common cause that:

- there was no contractual requirement for the employees to undergo polygraph testing;
- one of the employees had a legitimate objection to the testing and the employer's key witness conceded to this; and
- no evidence was led to prove the scientific validity or reliability of the polygraph test being used

The Labour Court held that absent proof that the polygraph is scientifically valid and reliable as a test for deception, the drawing of an adverse inference relating to the test constitutes a gross error of law.

The commissioner's reliance on the employees' refusal to take polygraph tests as a key part of the dismissal justification was held to be legally and factually flawed.

As a result, the Labour Court held that the arbitration award was not one that a reasonable commissioner could reach on the evidence before him, and it was accordingly reviewed and set aside, with the matter remitted to the CCMA for a rehearing before a new commissioner.

**EMPLOYMENT LAW  
ALERT**

# Are polygraph tests still useful in employment disputes?

CONTINUED



## Key takeaways

- When an employee refuses to submit to a polygraph test, an adverse inference can only be drawn under specific circumstances, such as instances where the employee is contractually obliged to undergo a polygraph test.
- In instances where an employee fails a polygraph test, adverse inferences should only be drawn when there is supporting proof of scientific validity of the polygraph results.
- Commissioners must assess all proven facts when drawing an inference and explain why the inference is the most plausible inference from all those that are conceivable. Selective reliance undermines reasonableness.

Jean Ewang, Biron Madisa, and Chantell De Gouveia



**Band 1**  
Employment

Cliffe Dekker Hofmeyr  
**Legal500**  
**2025**

**TIER 1**  
Employment

## Lessons on dismissal for incapacity due to ill-health

In *SACCAWU obo Bologo v JD Group (Pty) Ltd* [2025] 8 BALR 904 (CCMA) the Commission for Conciliation, Mediation and Arbitration (CCMA) upheld the dismissal of a long-serving salesperson for incapacity due to ill-health. Although the employer initially convened the process using a disciplinary hearing notice, the inquiry substantively addressed incapacity.

The commissioner found that the employer conducted a proper investigation, considered alternatives, afforded the employee participation and could not reasonably be expected to keep her position open indefinitely in the face of lengthy, repeated absences and inadequate medical substantiation. The dismissal was both substantively and procedurally fair.



### Background

The employee, employed since 2012 at Bradlows Protea Glen, was dismissed on 16 October 2024 for incapacity: ill-health. Between 1 April and 9 September 2024 she was absent for 163 days; when sick leave was exhausted, 12 days of annual leave were converted to maintain income. The employee had a history of prolonged absences dating back to 2019, often without timeous or adequate medical documentation, and a pattern of extended absences immediately after new sick leave cycles commenced. The employer convened a hearing in September 2024 using “disciplinary hearing” paperwork, but the chairperson treated it as an incapacity inquiry. The employer had previously conducted an incapacity consultation, twice assisted the employee with disability benefit applications (one rejected by the insurer, another abandoned for want of supporting documentation), and attempted workplace accommodation (including promotion, later reversed as she could not cope, and use of temporary staff).





## Lessons on dismissal for incapacity due to ill-health

CONTINUED



### Legal issue

Whether the dismissal for incapacity due to ill-health was fair in substance and procedure under section 191(5)(a)(i) of the Labour Relations Act 66 of 1995 (LRA), having regard to the erstwhile Schedule Code of Good Practice: Dismissal (Code), in circumstances where the notice initiating the inquiry referenced a disciplinary hearing but the process addressed incapacity.



### The law

- The Code: Dismissal may be justified where the employee is unable to perform work, especially where incapacity is prolonged or permanent, provided the employer conducts a proper investigation, consults the employee, considers alternatives to dismissal, and follows a fair procedure. The key test is whether the employer can reasonably be expected to accommodate or wait any longer.
- *Parexel International (Pty) Ltd v Chakane and Others* [2019] 11 BLLR 1245 (LAC): An employer need not tolerate prolonged absence – fairness turns on the employee's capacity, prognosis, and the impact on operations, and on whether the employee participates and provides meaningful medical information enabling assessment and accommodation.
- *Epibiz (Pty) Ltd v CCMA and Others* [2023] 11 BLLR 1188 (LC): Courts caution against non-informative medical certificates. Medical practitioners and employees should ensure certificates substantively justify absence and enable proper workplace decisions.

# Lessons on dismissal for incapacity due to ill-health

CONTINUED



## Application of law to the facts

### ***Procedural fairness***

The employer mistakenly issued a disciplinary hearing notice. However, the chairperson expressly treated the process as an incapacity inquiry, focused exclusively on ill-health, and afforded full participation and representation. The employee's representative chose not to lead evidence, relying instead on cross-examination and argument, and pressed only the technical irregularity. The commissioner held that the citation of the process did not prejudice the employee because her rights were observed and the inquiry addressed the correct issue. The process met the Code's procedural standards.

### ***Investigation and alternatives***

The employer's record showed:

- An incapacity consultation as early as 2019 and ongoing engagements thereafter.
- Two attempts to assist with disability benefits – one rejected by the insurer on capacity grounds, another stalled due to the employee's failure to provide documents.
- Conversion of annual leave to ensure income continuity, temporary staffing to mitigate operational disruption, and efforts to accommodate the employee, including a promotion and later demotion when attendance made the role untenable.

### ***Employee co-operation***

The employee repeatedly failed to furnish adequate medical reports explaining the reason for her extended absence or a probable return date. Consistent with *Parexel*, this frustrated the employer's assessment of capacity and accommodation. The CCMA regarded the case as one where the facts "*speak for themselves*": frequent, lengthy absences, lack of prognosis and significant operational impact on colleagues and the store.

### ***Substantive fairness***

Considering the frequency and duration of absence (163 days in five months, with a prior multi-year pattern), the negative operational and cost impact, and the employee's failure to demonstrate readiness to resume work or to provide adequate medical substantiation, the employer could not reasonably be expected to wait longer. Dismissal for incapacity was substantively fair.

## Lessons on dismissal for incapacity due to ill-health

CONTINUED



### Key takeaways

- A mislabelled notice does not vitiate an incapacity process if the inquiry substantively addresses ill-health, affords representation and causes no prejudice.
- Keep clear records of consultations, medical certificates, requests for prognosis, accommodation attempts and assistance with disability claims.
- Request meaningful medical information. Parties should seek functional capacity assessments and return to work timelines.
- Consider and document alternatives. Explore redeployment, modified duties, temporary cover and benefit pathways; and record why alternatives are not viable.
- Balance duration/frequency of absence, prognosis, operational impact and the employee's participation.
- Train relevant human resources people and line managers on dismissal processes, including incapacity.

**Aadil Patel, Nadeem Mahomed, Chantell De Gouveia, and Ayesha Karjieker**



2024

TOP TIER

Cliffe Dekker Hofmeyr





## OUR TEAM

For more information about our Employment Law practice and services in South Africa, Kenya and Namibia, please contact:



### Aadil Patel

Practice Head & Director:  
Employment Law  
Sector Head:  
Government & State-Owned Entities  
T +27 (0)11 562 1107  
E aadil.patel@cdhlegal.com



### Anli Bezuidenhout

Director:  
Employment Law  
T +27 (0)21 481 6351  
E anli.bezuidenhout@cdhlegal.com



### Frieda Kishi

Director | Namibia  
T +264 83 373 0100  
E frieda.kishi@cdhlegal.com



### Fiona Leppan

Director:  
Employment Law  
T +27 (0)11 562 1152  
E fiona.leppan@cdhlegal.com



### Imraan Mahomed

Director:  
Employment Law  
T +27 (0)11 562 1459  
E imraan.mahomed@cdhlegal.com



### Nadeem Mahomed

Director:  
Employment Law  
T +27 (0)11 562 1936  
E nadeem.mahomed@cdhlegal.com



### Yvonne Mkefa

Director:  
Employment Law  
T +27 (0)21 481 6315  
E yvonne.mkefa@cdhlegal.com



### Phetheni Nkuna

Director:  
Employment Law  
T +27 (0)11 562 1478  
E phetheni.nkuna@cdhlegal.com



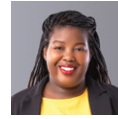
### Desmond Odhiambo

Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E desmond.odhiambo@cdhlegal.com



### Njeri Wagacha

Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E njeri.wagacha@cdhlegal.com



### Jean Ewang

Counsel:  
Employment Law  
T +27 (0)11 562 1499  
E jean.ewang@cdhlegal.com



### Thabang Rapuleng

Counsel:  
Employment Law  
T +27 (0)11 562 1759  
E thabang.rapuleng@cdhlegal.com



### JJ van der Walt

Counsel:  
Employment Law  
T +27 (0)11 562 1289  
E jj.vanderwalt@cdhlegal.com



### Ebrahim Patel

Legal Consultant:  
Employment Law  
T +27 (0)11 562 1000  
E ebrahim.patel@cdhlegal.com

## OUR TEAM

For more information about our Employment Law practice and services in South Africa, Kenya and Namibia, please contact:

**Daniel Kiragu**

Senior Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E daniel.kiragu@cdhlegal.com

**Malesela Letwaba**

Senior Associate:  
Employment Law  
T +27 (0)11 562 1710  
E malesela.letwaba@cdhlegal.com

**Lee Masuku**

Senior Associate:  
Employment Law  
T +27 (0)11 562 1213  
E lee.masuku@cdhlegal.com

**Leila Moosa**

Senior Associate:  
Employment Law  
T +27 (0)21 481 6318  
E leila.moosa@cdhlegal.com

**Christine Mugenyu**

Senior Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E christine.mugenyu@cdhlegal.com

**Kgodisho Phashe**

Senior Associate:  
Employment Law  
T +27 (0)11 562 1086  
E kgodisho.phashe@cdhlegal.com

**Taryn York**

Senior Associate:  
Employment Law  
T +27 (0)11 562 1732  
E taryn.york@cdhlegal.com

**Chantell De Gouveia**

Associate:  
Employment Law  
T +27 (0)11 562 1343  
E chantell.degouveia@cdhlegal.com

**Ayesha Karjieker**

Associate:  
Employment Law  
T +27 (0)11 562 1568  
E ayesha.karjieker@cdhlegal.com

**Biron Madisa**

Associate:  
Employment Law  
T +27 (0)11 562 1031  
E biron.madisa@cdhlegal.com

**Lynsey Foot**

Associate:  
Employment Law  
T +27 (0)11 562 1429  
E lynsey.foot@cdhlegal.com

**Shemonné Isaacs**

Associate:  
Employment Law  
T +27 (0)11 562 1831  
E shemonne.isaacs@cdhlegal.com

**Thobeka Kalipa**

Associate:  
Employment Law  
T +27 (0)11 562 1238  
E thobeka.kalipa@cdhlegal.com

**Kevin Kipchirchir**

Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E kevin.kipchirchir@cdhlegal.com

**Thato Makoaba**

Associate:  
Employment Law  
T +27 (0)11 562 1659  
E thato.makoaba@cdhlegal.com

**Thato Maruapula**

Associate:  
Employment Law  
T +27 (0)11 562 1774  
E thato.maruapula@cdhlegal.com

**Sheilla Mokaya**

Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E sheilla.mokaya@cdhlegal.com

**Sashin Naidoo**

Associate:  
Employment Law  
T +27 (0)11 562 1482  
E sashin.aidoo@cdhlegal.com

**Billy Oloo**

Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E billy.oloo@cdhlegal.com

**Melisa Wekesa**

Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E melisa.wekesa@cdhlegal.com

**BBBEE STATUS: LEVEL ONE CONTRIBUTOR**

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

**PLEASE NOTE**

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

**JOHANNESBURG**

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.  
Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E [jhb@cdhlegal.com](mailto:jhb@cdhlegal.com)

**CAPE TOWN**

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E [ctn@cdhlegal.com](mailto:ctn@cdhlegal.com)

**NAIROBI**

Merchant Square, 3<sup>rd</sup> floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.  
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114  
E [cdhkenya@cdhlegal.com](mailto:cdhkenya@cdhlegal.com)

**ONGWEDIVA**

Shop No A7, Oshana Regional Mall, Ongwediva, Namibia.  
T +264 (0) 81 287 8330 E [cdhnamibia@cdhlegal.com](mailto:cdhnamibia@cdhlegal.com)

**STELLENBOSCH**

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E [cdh Stellenbosch@cdhlegal.com](mailto:cdh Stellenbosch@cdhlegal.com)

**WINDHOEK**

1<sup>st</sup> Floor Maerua Office Tower, Cnr Robert Mugabe Avenue and Jan Jonker Street, Windhoek 10005, Namibia.  
PO Box 97115, Maerua Mall, Windhoek, Namibia, 10020  
T +264 833 730 100 E [cdhnamibia@cdhlegal.com](mailto:cdhnamibia@cdhlegal.com)

©2025 15163/SEPT

