

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURĀU ROHE**

[2022] NZERA 346  
3159525

BETWEEN	SHANE HADFIELD Applicant
AND	ATLAS CONCRETE LIMITED Respondent

Member of Authority:	Sarah Blick
Representatives:	Oliver Christeller, counsel for the Applicant James Turner, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	6 July 2022 from Applicant 17 June 2022 and 6 July 2022 from Respondent
Determination:	26 July 2022

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, Mr Shane Hadfield was dismissed by the respondent, Atlas Concrete Limited (Atlas), after he received a “non-negative” test for cannabis in a random drug test. He has filed a claim for unjustified dismissal and seeks lost wages and compensation from Atlas.

[2] Atlas has applied for an order excluding substantial parts of a brief of evidence filed for Mr Hadfield’s witness Mr Stephen Hassan. Mr Hassan is a union organiser employed by First Union. Atlas and First Union were parties to a collective agreement (CEA) in force at the time of Mr Hadfield’s employment. Mr Hadfield was a member

of First Union and was bound by the CEA at the relevant times during his employment. A brief of evidence in reply has also been filed for Mr Hassan.

[3] Atlas has asked for a preliminary determination to be issued on this admissibility issue, and Mr Hadfield has not opposed it being dealt with as such.

[4] The investigation meeting will be held on 28 July 2022.

[5] Atlas objects to paragraphs 6 to 20 of Mr Hassan's first brief of evidence on the basis it is opinion evidence and he is not an expert medical clinician, nor qualified, nor experienced or able to provide an expert opinion in cannabinoids, toxicology, pharmacology and/or medical matters relating to the influence of illicit drugs on people including Mr Hadfield. It says he is not qualified to provide an expert opinion on the content of documents filed with it, or their interpretation. Atlas says his evidence on these matters is not admissible under s 25 of the Evidence Act. Atlas says a primary issue for investigation by the Authority will be whether Mr Hadfield was attending to work "under the influence" of drugs.

[6] Mr Hadfield opposes the application to exclude the relevant parts of Mr Hassan's first brief of evidence. He says at paragraphs 3 to 8 Mr Hassan introduces his experiences as a union organiser, and at paragraphs 9 to 20 Mr Hassan introduces and summarises relevant information contained in publicly available government reports. Mr Hassan also provides an ESR Lab drug test result. Mr Hadfield says information in the reports and ESR document are relevant to issues in this matter. He says Mr Hassan is entitled to draw the Authority's attention to relevant information and the Authority is entitled to consider it.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and/or law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all of the information I have before me I have carefully considered it.

[8] Section 160 of the Employment Relations Act 2000 (the Act) gives the Authority a wide discretion regarding the evidence it may consider. Section 160(2) says that "the Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not." It is

not bound by technicalities and may consider evidence that might otherwise be deemed inadmissible in other jurisdictions. The Authority is however guided in the exercise of that discretion by the provisions of the Evidence Act 2006, even though it does not govern proceedings in the Authority.

[9] While it is helpful for expert witnesses giving evidence in the Authority to be familiar with the High Court Rules (HCR) affecting expert witnesses, these do not apply to the Employment Relations Authority jurisdiction.

[10] The Authority acknowledges that Mr Hassan cannot be considered an independent person as he is an employee of the First Union who supported Mr Hadfield during Atlas' disciplinary process and is now to give evidence in support of his case in the matter. However, that is not the end of the matter.

[11] Mr Hassan's evidence speaks of his experiences as a union organiser within the Transport and Logistics Division of First Union. He says the workers represented within the Division are almost all employed in safety sensitive areas, and that many of those workers are subject to urine drug testing in which the most common non-negative result is for THC-acid. He says his experiences as an organiser in the Division assisted him in making arguments on behalf of Mr Hadfield in meetings before Mr Hadfield was dismissed. Some of what Mr Hassan says in his brief of evidence forms part of the evidence already, in light of arguments he made during the disciplinary process. It would be a difficult and a possibly artificial exercise to attempt to carve out parts of his evidence relating to that process from his experiences as an organiser which informed his approach to it.

[12] Other parts of Mr Hassan's first brief of evidence produce the third report of an Independent Expert Panel on Drug Driving – "Setting Statutory Limits for Blood Drug Concentrations Relating to Impaired Driving", and a Final Report issued by that Panel dated April 2021. Mr Hassan has interpreted to parts of the reports in his first brief of evidence. The Authority is willing to allow Mr Hassan to refer to relevant parts of the reports on testing, which are publicly available in any event. If Mr Hassan's evidence strays beyond the literature, the Authority will certainly carefully consider whether or not any weight is to be given to it.

[13] Finally, Mr Hassan's first brief of evidence produces and refers to a redacted ESR lab report which states that "THC Acid levels do not indicate impairment or when and how much cannabis was used". Whilst the ESR lab report does not relate to Mr Hadfield, whether Mr Hadfield was attending to work "under the influence" of drugs is clearly an issue between the parties and one for the Authority to investigate. Technical information that has the capacity or tendency to assist the Authority in determining that issue will be allowed.

[14] I am accordingly not prepared to exclude any paragraphs of Mr Hassan's first brief of evidence. The Authority is able to assess what if any weight should be given to the evidence that Mr Hassan gives. Atlas can cross examine on such evidence to contradict or challenge it – indeed, it can question Mr Hassan as to his qualifications or relevant expertise, training or industry experience, analysis and breadth of his learning or extent of literature he has authored on the subject of drugs (if any). Further, both parties can address the Authority on the probative value (if any) of any such evidence and on what if any weight should be given to it in their submissions.

### **Costs**

[15] Costs are reserved and will be dealt with when dealing with costs for the substantive matter.

Sarah Blick  
Member of the Employment Relations Authority