IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 470
3159525

	BETWEEN	SHANE HADFIELD Applicant
	AND	ATLAS CONCRETE LIMITED Respondent

Member of Authority:	Sarah Blick
Representatives:	Oliver Christeller and Grace Liu, counsel for the Applicant James Turner, counsel for the Respondent
Investigation Meeting:	20 December 2022 in Auckland
Submissions and information received:	10 February 2023 and 17 March 2023 from the Applicant 3 March 2023 and 19 June 2023 from the Respondent
Determination:	23 August 2023

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] The applicant Shane Hadfield was employed as a concrete truck driver by the respondent Atlas Concrete Limited (Atlas), until he was dismissed after receiving a "non-negative" test for cannabis in a random drug test. Mr Hadfield admitted smoking cannabis during the weekend prior to the random test on a Monday, and says Atlas incorrectly concluded he was under the influence of drugs because he was not impaired while attending work. For that and other reasons he claims he was unjustifiably dismissed and seeks lost wages and compensation from Atlas. In closing submissions Mr Hadfield also sought to claim he was unjustifiably disadvantaged as a result of his suspension after the test.

[2] Atlas denies Mr Hadfield's dismissal was unjustified and that he is entitled to any remedies. Atlas says given Mr Hadfield's admitted to drug use, the parties' rights and obligations under the applicable collective employment agreement (CEA), its drug and alcohol policy, the dangerous nature of the role of a driver and Atlas' overarching concern for health and safety, the decision to dismiss him summarily was justified. Atlas also says because Mr Hadfield's personal grievance for unjustified disadvantage was raised late and out of time, it should not be investigated.

What was the Authority's process?

[3] Witness statements were lodged for Mr Hadfield, First Union organiser Stephen Hassan and forensic scientist Dr Helen Poulson. Atlas previously applied for an order excluding substantial parts of Mr Hassan's witness statement, which was declined.[1]

[4] For Atlas, witness statements were lodged for its Takapuna Depot Manager Donovan Walker and Chief Financial Officer Gregory Stewart. Atlas also lodged statements for toxicologist Grant Moore and occupational, environmental and aviation physician and medical review officer, Dr David Payne. All witnesses answered questions under affirmation from the Authority and the parties' representatives.

[5] 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.

What are the issues?

[6] The issues requiring investigation and determination are:

(a) Should Mr Hadfield be able to pursue a personal grievance for unjustified disadvantage in relation to his suspension?

(b) Was Mr Hadfield unjustifiably dismissed from his employment?

(c) Should remedies be awarded and are there issues of contribution?

(d) Should either party contribute to the costs of representation of the other party?

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[1] *Hadfield v Atlas Concrete Limited* [2022] NZERA 346.

What is the background?

Parties

[7] Atlas has its head office and a depot at Takapuna, Auckland. Mr Hadfield is a very experienced truck driver who started working fulltime for Atlas in February 2016 at the depot.

Collective employment agreement covered Mr Hadfield's work

[8] First Union and Atlas were parties to the CEA in force from 16 February 2021 to 14 February 2022. The terms and conditions of the CEA applied to Mr Hadfield's employment at the relevant times.

[9] Clause 3.2 of the CEA provided that employees covered by the CEA agreed to abide by all of Atlas' notified rules, policies and procedures.

[10] Clause 16.7 provided that "in the event of an accident or evidence of intoxication at work" the employee may be required to undergo a drug and/or alcohol test from a registered medical practitioner. The CEA did not make reference to the ability to carry out random drug or alcohol testing.

[11] Clause 17 dealt with Atlas' disciplinary procedures. Clause 17.1 stated:[2]

> In cases of serious misconduct the employer shall have the right to dismiss the employee summarily. Serious misconduct, which may render the employee liable for summary dismissal, includes but is not limited to the following:
> …
> 17.1.3 *Attending to work under the influence of* alcohol and/or *drugs*, bringing on to or consuming alcohol and/or drugs on work premises without the approval of Atlas, or *driving any of the Atlas vehicles or equipment under the influence* of alcohol and/or *drugs*;

[12] Clause 17.2 said where an act of serious misconduct has not resulted in summary dismissal or in cases of less serious misconduct, the employee shall be dealt with in accordance with a warning system – starting with a verbal warning, a written warning, then final written warning.

[13] Clause 17.3 stated where Atlas believes it has cause, it shall have the right to suspend the employee from their employment on pay for such period as Atlas shall, at its sole discretion, determine.

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[2] Emphasis added.

[14] Clause 18.2 provided notice requirements did not prevent Atlas from dismissing an employee summarily for misconduct, and no notice shall be payable for summary dismissal for serious misconduct.

[15] Appendix 1 of the CEA outlined the position description of a Driver, which included actively promoting health and safety policies and regulations and responsibility for the employee's own actions with regard to driving laws on New Zealand roads.

Drug and alcohol policy

[16] Atlas provided the Authority with an Alcohol and Drugs Policy dated September 2020 (the 2020 policy). It says it has had a drug and alcohol policy since 2010, which was last updated in 2020. Atlas says its policy had been implemented and communicated to staff and was supported by First Union.

[17] Mr Hadfield has referred to a recent determination issued by another Authority Member which indicated changes to Atlas' drug and alcohol policy were made in 2020.[3] The earlier determination relates to a former Atlas employee dismissed in May 2020 after similarly returning a non-negative result for cannabis. The applicant in that matter was successful, but Atlas challenged the determination and the parties resolved all matters on challenge and by consent the determination was set aside. Given the status of the determination, following receipt of submissions in this matter I requested a copy of the policy referred to in the determination (2014 policy), which Atlas has provided.

[18] Clause 2.1 of the 2020 policy says employees in safety sensitive roles may be randomly selected for testing for the presence of drugs and alcohol, and the procedure is described in Schedule 4, which is entitled "Random Testing". Any employee who uses a motor vehicle in the course of their employment is defined as holding a safety sensitive role subject to random testing under the policy. It is common ground that Mr Hadfield held a safety sensitive role. The 2014 policy also says employees may be randomly selected for testing of drugs and alcohol.

[19] Clause 6 of the 2020 policy provides Atlas may assist with an alcohol and drug programme for an employee who returns a positive test for drugs and/or alcohol "for a first time, so commits serious misconduct and is potentially liable for dismissal,

[3] *Cleland v Atlas Concrete Limited* [2022] NZERA 195.

however their employment is not terminated, subject always to the Company's discretion". Clause 6 also says at Atlas' sole discretion it may allow an employee to take unpaid leave to participate in a drug and alcohol rehabilitation or treatment programme.

[20] Clause 7.1.2 of the 2020 policy says a positive drug or alcohol test for post incident, accident, reasonable cause or random testing may result in the following:[4]

> First Occasion
> *A first positive drug or alcohol test will be treated as potentially serious misconduct*, and *that potentially renders an employee liable for instant dismissal*, or other formal disciplinary measures. Formal disciplinary procedures or measures may include, at the Company's discretion, any of the following:
>
> (i) An interview with the employee where an explanation for the positive test will be sought.
> (ii) The *employee may be suspended from duty without pay*. The employee may not be permitted to return to work until such time as they have undertaken and passed a subsequent screening test.
> (iii) The employee being advised of the unacceptability of their behaviour and the risk such behaviour creates for the safety of the individual and other employees. The employee being advised of their responsibility to demonstrate the problem has been effectively addressed. The employee may, at the discretion of the Company, be offered the opportunity to participate in counselling or an appropriate rehabilitation programme.
> (iv) The employee being formally offered the opportunity to participate in counselling or an appropriate rehabilitation programme.
> (v) The employee may receive a formal written warning, or disciplinary action up to an including dismissal (with or without prior notice).
> (vi) The employee being advised that following a positive test result they will be subjected to random testing over the following year. This random testing may involve up to 6 tests per year over a two year period.
> (vii) The employee being advised that any future breach of the policy may result in a further warning or termination of employment for serious misconduct.

[21] The 2020 policy also says formal disciplinary procedures "may" be invoked on a second occasion and will ordinarily be treated as serious misconduct which "could" result in termination of employment.

[22] Schedule 4 of the 2020 policy records some salient points under "Procedure" for random testing:[5]

> a) *Advise the employee that they are required to undergo the test and they may consult their representative* at this time but the testing cannot be delayed.
> …

[4] Emphasis added.
[5] Emphasis added.

d) If the urine specimen returns a "not negative" screening result or its integrity is suspect, *remove the employee from the employment site without pay* until the confirmed results are available from an approved and accredited laboratory.
e) If the result is positive for drug or alcohol, or the specimen has been deliberately adulterated, *refer employee to the rehabilitation programme*.

[23] In the 2014 policy, Schedule 4 provided that upon a non-negative sample, the employee would be removed from site on "full pay" while waiting on the confirmed test results. The policy was clearly altered in this respect in 2020.

[24] Schedule 5 of the 2020 policy says employees may be offered the opportunity to voluntarily join Atlas' supported drug and alcohol rehabilitation programme. It says "current employees returning a positive test who want to continue employment, are required, if offered at the Company's sole discretion, to join the Company's supported drug & alcohol rehabilitation programme". The 2014 policy made no reference to Atlas offering rehabilitation at its "sole discretion". The 2020 policy was therefore amended to introduce a discretion. Both policies detail what the programme is – it is a formal programme, including an initial assessment by a substance abuse professional, up to six sessions with a drugs and alcohol substance abuse specialist, up to six unannounced follow up tests per year for one year, and the employee must sign a contract agreeing to the programme and follow up testing.

[25] Atlas says an earlier First Union organiser or organisers supported the policy. Mr Hassan gave evidence that he became the organiser responsible for Atlas in early 2020, and says he was never asked to, nor did he express support for the 2020 policy. He says at no stage was First Union provided a copy of the 2020 policy nor was it asked to comment on it or consulted about it. Mr Hassan also refers to the fact he sent claims to Atlas on 13 October 2020 on behalf of union members for collective bargaining. One of the claims was for Atlas "to agree only to use drug tests which detect impairment" and during bargaining for a new CEA he said urine testing could not detect impairment and said saliva testing was a better option. In those circumstances, First Union rejects Atlas' claim the union supported the 2020 policy.

Meetings regarding policy

[26] Atlas says in 2018 and 2019 Mr Hadfield attended two meetings, the former in relation to its drug and alcohol policy and the latter in relation to the protocol of the drug and alcohol testing van of its provider when it came on site to the depot.

[27] Mr Walker says a morning meeting was held on 8 April 2021 which Mr Hadfield attended regarding Atlas' drug and alcohol policy. Mr Walker says he had a copy of the 2020 policy with him which he went through and talked about Atlas' "strict approach", being to caution against using illicit drugs. Mr Walker says staff were told that if unprescribed cannabis was used and shown to be in their system, and they came to work to drive a truck, then the "outcome would not be good". The documentary evidence of what was discussed at the meeting is entitled "meeting minutes" and says attendees acknowledge the drug and alcohol Policy including CBD rules, followed by attendee names and signatures. Mr Hadfield acknowledges attending the meeting and signing as an attendee, but does not believe the policy was discussed in any detail. He says there was no opportunity at the meeting to read the 2020 policy. He says Atlas' approach at the meetings was just to obtain staff signatures, essentially as a tick box exercise, which Mr Walker denies.

[28] At the Authority's investigation meeting, Mr Hadfield acknowledged the policy was available for staff review in the smoko room at the depot, and that he had tried to read the policy but it was not the sort of document he could read without assistance. Mr Walker says in his experience Mr Hadfield had no problem in comprehending any written instructions or documents in the course of his employment.

Mr Hadfield underwent random testing on 31 May 2021

[29] On Monday 31 May 2021 Mr Hadfield went to work and did one concrete delivery in his truck without incident. When he returned to the yard after the delivery, the provider's van was at the workplace. Mr Hadfield received a call on his Radio Transmitter telling him he had been selected to have a drug and alcohol test. Mr Hadfield signed the provider's consent form to undergo testing and to the results being communicated to his employer. The test was taken and the result showed the drug screen for "THC" required further analysis.

[30] The provider contacted Mr Walker as depot manager and advised of the non-negative test result. A few minutes later Mr Hadfield walked into Mr Walker's office without being called to a meeting. Mr Walker says Mr Hadfield stated "I fucked up boss, sorry" and said he had had an argument with his wife on the Saturday before, went to a party, got drunk and smoked cannabis at the party and then woke up on a park bench in Sandringham, which he explained was "not good". Mr Walker says Mr Hadfield looked very concerned as if he knew he had been caught and said "I've already

been done", to remind Mr Walker of a drug-related issue with a previous employer. Mr Hadfield says he asked "Is that me fucked now?" or words to that effect, and Mr Walker replied "pretty much Shane". Mr Walker denies that reply.

[31] It is common ground Mr Walker then told Mr Hadfield he was suspended. There is no suggestion Mr Walker asked for Mr Hadfield's comment on the proposed suspension. Mr Walker says he also told Mr Hadfield that counselling was available through Atlas, which Mr Hadfield did not take up. Mr Hadfield then left the workplace.

[32] Mr Hadfield's sample underwent laboratory testing which confirmed a positive cannabis test result for THC-COOH showing 97ng/ml of cannabis in Mr Hadfield's system, being higher than the screen "cut off" of 15 ng/ml of cannabis.

Atlas invited Mr Hadfield to an "investigation meeting"

[33] On 3 June 2021 Mr Walker wrote to Mr Hadfield informing him the laboratory result showed a non-negative sample of Tetrahydrocannabinol (THC) was produced. The letter invited Mr Hadfield to attend an investigation meeting on 8 June 2021 to "listen to your reasons why the non-negative sample was produced". The letter advised that Mr Stewart would attend and recommended Mr Hadfield bring a support person. The letter did not say Mr Hadfield could bring a representative. There was also no reference to allegations of misconduct or serious misconduct, Atlas' view that Mr Hadfield may have been under the influence of drugs in the workplace in breach of the CEA, or of possible disciplinary consequences in relation to the non-negative test.

[34] Mr Hadfield contacted First Union about the 8 June 2021 meeting. On 4 June 2021 Mr Hassan emailed Atlas advising he would be representing Mr Hadfield at the meeting, that he had the provider's certificate of analysis but requested all other relevant information including the suspension letter, policies and correspondence. On the morning of 8 June 2021, the day of the meeting, Atlas emailed Mr Hassan and Mr Hadfield a copy of the 2020 policy, a signed attendance sheet of the health and safety meeting from April 2021, laboratory results and the invitation to attend the investigation meeting.

The meeting on 8 June 2021

[35] Mr Hadfield attended the meeting on 8 June 2021 with Mr Hassan, Mr Walker and Mr Stewart. Atlas' brief notes of the meeting show Atlas confirmed Mr Hadfield's

suspension was confirmed verbally, and not in writing. Mr Walker then asked Mr Hadfield to provide a reason why he had produced a "non-negative" test. The notes say Mr Hadfield explained he had been having "domestics" with his lady and the bickering had got to him. It said he was having issues with his feelings and on Saturday 29 May 2021 he went to a bar and lost control and "lost time" and woke up in the suburb of Morningside. The notes show Atlas was advised the cannabis consumption did not occur before work (namely the Monday Mr Hadfield was tested). Atlas says Mr Hadfield acknowledged he was aware of its "Drug Policy". Mr Walker says he advised Mr Hadfield Atlas was likely to consider the conduct serious misconduct, and that Atlas deemed a positive test result to be "under the influence" under clause 17.1.3 of the CEA.

[36] Mr Hassan says he and Mr Hadfield explained Mr Hadfield was not a regular cannabis user and using it was uncharacteristic for him. Mr Hassan says he explained given Mr Hadfield had smoked cannabis on the Saturday night and did not attend work until the Monday morning he would not have been impaired or under the influence of cannabis when he attended work. He says he explained urine tests are for THC-acid and do not test impairment or whether a worker is under the influence of cannabis. Mr Hassan says Mr Walker responded that the drug tests are not for impairment, and that his attitude was "zero tolerance" and that Mr Hadfield should not have smoked cannabis even on the weekend. Atlas denies there was any discussion about whether or not the level of cannabis in Mr Hadfield's system meant he was impaired or not, whether it was "characteristic" for Mr Hadfield to smoke cannabis, and Atlas taking a "zero tolerance" approach. It is common ground Mr Hadfield was apologetic at the meeting and regretted the non-negative result.

[37] On 9 June 2021 Mr Walker wrote to Mr Hadfield referring to the 8 June meeting, stating:

> You told me that you went out to town and consumed excessive amounts of alcohol and woke up on a park bench in Sandringham. You mentioned you did a "stupid thing" consuming cannabis. We also discussed the reading on the laboratory screening test. You confirmed you understand the Drug and Alcohol Policy.
>
> I took your feedback into account and on balance I have decided that the provision of a non-negative drug test occurred and that this is in breach of the Drug & Alcohol Policy. The Fifth Schedule to your employment agreement sets out items which are considered serious misconduct and liable for instant dismissal, paragraph 11 refers to "Attending work whilst intoxicated or under the influence of alcohol or (non-prescribed) drugs". We feel that your provision of a non-negative drug test meets the definition of attending for work under the influence

> of non-prescribed drugs. On this basis I have reached the preliminary view that it is appropriate to dismiss you without notice.

[38] The letter incorrectly referred to the Fifth Schedule of Mr Hadfield's earlier individual employment agreement. The letter further said Mr Walker would like to hear Mr Hadfield's views in relation to the proposed disciplinary action and give him an opportunity to respond, and give any additional or clarifying information he believed was relevant. A meeting was proposed for the next day. The letter also advised Mr Hadfield was entitled to bring a representative or other support person with him.

[39] On 10 June 2021 Mr Hadfield, Mr Hassan, Mr Walker and Mr Stewart met again. Atlas' brief meeting notes say Mr Hadfield confirmed he consumed the cannabis on the Saturday (29 May 2021), that he apologised, said he had stuffed up, and that it would not happen again if he was given a second chance. The notes say Atlas noted Mr Hadfield's good work attendance record and that he worked hard. They record Mr Walker as expressing disappointment and that Mr Hadfield was aware of Atlas' "position regarding non-negative drug tests". Atlas says Mr Hassan 'tried to take over the meeting" and said that Mr Hadfield was "not under the influence" of cannabis, or was not impaired. Mr Hassan says he explained urine tests tested for a metabolite of THC, not the psychoactive substance itself. He explained the result was consistent with Mr Hadfield's explanation and did not indicate he was under the influence at the time of the testing. Mr Hassan says Mr Walker made it clear that since he had become manager at the depot, he had terminated the employment of all other workers who had received non-negative drug results.

Dismissal decision and letter

[40] Atlas told the Authority that it genuinely considered Mr Hadfield's explanation including Mr Hassan's claim that there was no impairment or influence. Mr Walker says Mr Hadfield was regretful, admitted smoking cannabis, and that he wanted another chance. He also referred to Mr Hadfield having previously advised he had been dismissed by another employer for a drug issue. Mr Walker says it was therefore not Mr Hadfield's "first time with a deliberate use of drugs, and a warning would not do".

[41] On 11 June 2021 Atlas wrote a very brief letter to Mr Hadfield dismissing him for serious misconduct with immediate effect, citing clause 17.1.3 of the CEA, that "attending for work under the influence of alcohol or drugs" is considered serious misconduct that may be liable for summary dismissal. The letter again incorrectly

referred to the Fifth Schedule of Mr Hadfield's individual employment agreement, which noted this to be serious misconduct.[6] The letter says having considered all the information Atlas found Mr Hadfield's actions amounted to serious misconduct.

Drug testing generally

[42] Before addressing whether Mr Hadfield has a personal grievance or grievances, I note drug testing regimes significantly impinge on individual rights and freedoms. The Court has made clear policies dealing with the same, and their application, must meet the legal tests of being lawful and reasonable directions to employees and should be interpreted and applied strictly.[7] I consider Atlas' interpretation and application of its drug policy against that standard.

Should Mr Hadfield be able to pursue a personal grievance for unjustified disadvantage in relation to his suspension?

[43] An employer must comply with the applicable employment agreement when implementing the suspension of an employee.

[44] Mr Hadfield was verbally suspended on 31 May 2021 following the initial non-negative specimen result. Schedule 4 of the 2020 policy, which addressed random testing, stated if a urine specimen returned a non-negative result, the employee will be removed from the employment site "without pay" until the confirmed results were available from an approved and accredited laboratory. Mr Hadfield's confirmed results were available as early as 3 June 2021, yet he remained unpaid after that time. While Atlas appears to have failed to comply with Schedule 4, more importantly it breached clause 17.3 of the CEA which only gave Atlas the right to suspend "on pay". The 2020 policy did not supersede the right to be paid, particularly in the absence of First Union's agreement to or support of the amended policy, as discussed below. Mr Hadfield was accordingly financially disadvantaged by this unjustified action.

[45] The statement of problem lodged with the Authority referenced Mr Hadfield's suspension from employment but did not refer to it as a separate cause of action or seek a remedy in relation to it. However, Mr Hadfield's letter raising a personal grievance in relation to the dismissal expressly raised a personal grievance for unjustified disadvantage in relation to his suspension, and the issue of Mr Hadfield's suspension

[6] The correct schedule was the Sixth Schedule, had it been relevant.
[7] *Parker v Silver Fern Farms Ltd (No 1)* [2009] ERNZ 301, at [26].

was canvassed in evidence at the Authority's investigation meeting. In closing submissions Mr Hadfield submitted the Authority should apply section 122 of the Act (which allows a finding that a personal grievance is of a type other than alleged) and find Mr Hadfield has a personal grievance for unjustified disadvantage in relation to the suspension. As such he now seeks reimbursement of lost wages for the two week suspension period totalling $2,158.48 and compensation for distress and humiliation of no less than $3,500. Atlas has responded, incorrectly stating Mr Hadfield did not raise his suspension as a personal grievance within time.

[46] In the circumstances, with the parties having the opportunity to comment on the matter, I consider it just and fair to utilize s 122 and therefore find Mr Hadfield has a personal grievance for unjustified disadvantage.

[47] For completeness, it is clear Mr Hadfield was not given an opportunity to be heard about Atlas' decision to suspend him. However, in light of Mr Hadfield's non-negative test result and his safety sensitive role, a fair and reasonable employer in the circumstances could have chosen to implement the suspension without seeking Mr Hadfield's comment. I am not satisfied he has a personal grievance for unjustified disadvantage on that basis.

Was Mr Hadfield unjustifiably dismissed from his employment?

The test of justification

[48] The test of justification is set out at section 103A of the Act. The test is whether Atlas' actions, and how Atlas acted in terminating Mr Hadfield's employment, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[49] In reaching a conclusion, the Authority must consider:

a. Whether Atlas sufficiently investigated before taking action;
b. Whether Atlas raised any concerns that it had with Mr Hadfield before taking action;
c. Whether Mr Hadfield had a reasonable opportunity to respond;
d. Whether Atlas genuinely considered Mr Hadfield's responses.

[50] The Authority may also take into account any other additional factors it thinks appropriate. I must also consider whether Mr Hadfield's dismissal was consistent with Atlas' obligations to act in good faith and to act in a fair manner.

First Union did not support 2020 policy

[51] As noted above, there was a dispute as to whether First Union was aware of or supported Atlas' drug and alcohol policy. I resolve that dispute before further considering the process leading to dismissal.

[52] In the past First Union may have supported earlier versions of Atlas' drug and alcohol policy. However, I accept Mr Hassan's evidence that First Union was not aware of and did not express support for the 2020 version of the policy, for the reasons Mr Hassan outlines. Further, the fact the changes to the policy also affected employee rights, including expressly introducing a "sole discretion" as to how Atlas dealt with cases of non-negative tests, and purporting to remove an employee's right to full pay while suspended (which was at odds with the CEA) support this finding.

[53] It does seem clear the seriousness with which non-negative results would be treated was made clear to Mr Hadfield at one or more staff meetings. I am further satisfied the 2020 policy was available for staff review in the smoko room at the depot. However, changes to the 2020 policy resulted in parts of it becoming internally inconsistent and confusing. For example, in one part it referred to Atlas' "sole discretion" in disciplinary matters including offering rehabilitation, but in Schedule 4 relating to random testing, it indicates employees will be referred to rehabilitation as standard practice. It is clear Mr Hadfield understood the seriousness of his employment situation, but this seems to be because Atlas was now taking what could only be called a "zero tolerance" approach to non-negative drug and alcohol tests, despite the policy taking a more balanced approach. Had Atlas consulted with First Union on the amendments, it is possible those inconsistencies could have been identified and addressed.

[54] I am satisfied Atlas has had a long-standing random testing regime in its policy which employees have been subject to over a number of years, which has existed alongside its employment agreements with employees. There is no evidence before me that prior to Mr Hassan's involvement as organiser, First Union objected to that manner of testing. However, in assessing Atlas' actions in respect of interpreting and applying

the 2020 policy here, where clauses of the updated 2020 policy were inconsistent with relevant terms and conditions of the CEA, they were invalid and it was unreasonable for Atlas to rely on them.

Procedural justification

[55] I find Atlas failed to act in accordance with Schedule 4 of the 2020 policy, which required Mr Hadfield to be advised that when he was required to undergo the test, he had the right to consult a representative. Atlas claims it had previously made Mr Hadfield aware of his ability to consult a representative prior to testing, so it had already complied with that requirement. I do not accept the policy can be read in that way. It required advice to be given on each occasion of random testing.

[56] Schedule 4 further stated if a result is positive for drug or alcohol, Atlas would refer the employee to its rehabilitation programme. Although Mr Walker may have offered Mr Hadfield counselling on 31 May 2021, there is no evidence to suggest he was referred to a rehabilitation programme upon confirmation of the test result as required by the 2020 policy.

[57] Atlas' letters to Mr Hadfield were deficient in a number of respects. For example, in its first letter to Hadfield on 3 June 2021, Atlas failed to provide him with documents relevant to the meeting (such as the CEA and the 2020 policy). The letter also did not say Mr Hadfield could bring a representative, refer to any allegations of misconduct or serious misconduct, or Atlas' view that Mr Hadfield may have been under the influence of drugs in the workplace in breach of the CEA. Finally, it failed to advise of the possible disciplinary consequences in relation to the non-negative test. Fortuitously for Atlas, some of these defects did not seem to result in unfairness because Mr Hadfield sought First Union's assistance. Mr Hassan then requested relevant documents including the policy and Mr Hadfield was represented by Mr Hassan at the meeting.

[58] In its letter of 9 June 2021 Atlas confusingly cited the fifth schedule of Mr Hadfield's expired individual employment agreement as applying. The letter this time did at least reference the policy and said Mr Hadfield confirmed he "understood" it (although the meeting notes simply say Mr Hadfield was "aware" of it). While Atlas' letter of 11 June 2021 correctly referred to the CEA, it confusingly again referred to Mr Hadfield's expired individual employment agreement.

[59] In his evidence before the Authority, Mr Walker referred to Mr Hadfield advising him previously that he been dismissed by an earlier employer for a drug issue. Mr Walker says this was therefore not Mr Hadfield's first time "with a deliberate use of drugs, and a warning would not do". However, this was clearly Mr Hadfield's "first occasion" testing positive with Atlas, and should have been treated as such under the policy. Mr Walker also refers to supporting Mr Hadfield earlier in his employment in relation to a District Court matter. If drug use with a previous employer and matters before the District Court were considered relevant to the decision to dismiss, which Mr Walker clearly thinks they were, a fair and reasonable employer would have put those matters to Mr Hadfield for comment prior to dismissal. There is no evidence they were.

[60] There is also no evidence Atlas genuinely considered Mr Hadfield's explanation about his personal circumstances leading to the non-negative test nor his previous good service as an employee when making the decision to dismiss. Mr Hadfield had apologised, said it would never happen again, and asked for a second chance. The brief dismissal letter gave no indication Mr Walker had given any consideration to Mr Hadfield's explanation or circumstances, Mr Hassan's submissions, or terms of the 2020 policy. It makes no mention of whether an offer of rehabilitation or other alternative disciplinary options were considered. The discretion introduced into the 2020 policy served no purpose if there were no circumstances it would ever be exercised, whether on a first or second occasion. Atlas considered employees were bound by the policy, and it was too. A fair and reasonable employer could be expected to consider its own policy before dismissing an employee. Atlas failed to turn its mind to any of the other options under the policy, and as such closed its mind to any alternatives in accordance with what can only be said to be zero tolerance approach.

[61] I find Atlas failed to meet the statutory test for justification. Atlas conducted a perfunctory investigation and its findings rested on a labelling of serious misconduct in the CEA as warranting dismissal. In all the circumstances the cumulative procedural defects in the investigation were more than minor and resulted in Mr Hadfield being treated unfairly.

Substantive justification

[62] In making the finding of serious misconduct, Atlas relied on clause 17.1.3, that Mr Hadfield attended for work under the influence of alcohol or drugs being conduct that may be liable for summary dismissal. A definition in an employment agreement

of a behaviour that could be serious misconduct warranting dismissal does not necessarily make it so.[8] Such labelling does not free an employer from meeting the statutory test for justification.

[63] The CEA does not state returning a non-negative drug test may be considered to constitute serious misconduct. Rather, as noted, clause 17.1.3 of the CEA states "Attending to work under the influence of alcohol and/or drugs" may constitute serious misconduct. First Union, through Mr Hadfield, says no fair and reasonable employer could have reached the conclusion that Mr Hadfield attended work "under the influence" of drugs in all the circumstances.

[64] At one or both meetings with Mr Walker and Mr Stewart, Mr Hassan argued that urine tests test for THC-acid and do not test impairment or whether a worker is under the influence of cannabis. He explained that the urine test was for a metabolite of THC not the psychoactive substance itself. Mr Hassan says he made it clear he considered the concepts of "impairment" and "under the influence" as synonymous. Atlas was, and remains of the view, that the provision of a non-negative drug test meets the definition of attending work under the influence non-prescribed drugs. Any cannabis in Mr Hadfield's system meant he was "under the influence".

[65] The parties chose to call expert witnesses to address the issue of whether Mr Hadfield could be considered "under the influence" for the purposes of the CEA. The Authority was greatly assisted by their expertise. After their witness statements were lodged, at the Authority's direction the experts conferred and produced a statement of points of agreement and disagreement. That joint statement is outlined in full:

> 1. We agree a one off LCMSMS result of 97ng/mL for THC-COOH (urine) cannot indicate the time, the dosage, the frequency or the potency of the previous use(s) of cannabis.
> 2. We agree a one off LCMSMS result of 97ng/mL for THC-COOH (urine) cannot confirm impairment due to cannabis at the time of donation.
> 3. We agree a fitness for work assessment is the area of expertise for an Occupational Physician and not a toxicologist.
> 4. We agree a toxicologist is not qualified to comment on impairment in a work place setting, this being the area for an Occupational Physician.
> 5. We agree the presence of THC metabolites (THC-COOH) in the urine indicate previous THC usage.
> 6. None of us are able to identify a way in which the presence of THC metabolites can occur de novo (arising afresh without previous cannabis usage) in the urine (i.e. it must have come from cannabis).

[8] *Holder v Dee Gee Holdings Ltd t/a Cheapskates Wellington* [2020] NZERA 155.

7. We do NOT agree that the terms ‘under the influence’ and ‘impairment’ are synonymous. Mr Moore and Dr Payne identify a difference between these two terms. Dr Poulsen interprets these phrases as being identical in their meaning.
8. We agree that none of us use the term ‘under the influence’ in our everyday working life apart from when asked by external agencies/forums/lawyers.
9. We all agree that a one off LCMSMS result of 97ng/mL THC metabolites (urine) **could** have arisen from cannabis usage 36 hours prior, but also agree that the same result **could have arisen** from usage 2 hours prior to donation (i.e. earlier on the morning of the test).
10. Due to the above point we all agree that the one off LCMSMS result of 97ng/mL (for THC metabolites in urine) **cannot** exclude impairment from cannabis at the time of donation, nor can it pinpoint as to the timing or the frequency or potency of ingestion in this particular case.
11. We all agree that none of us are qualified to comment on misconduct.
12. We all agree that although blood and oral fluid (OF) are modalities used for testing (in other areas – e.g. countries, environments, workplaces, legal settings etc), these are not applicable in this case as the urine was tested according to the ASNZA 4308/2008 standard.
13. We all agree that none of us would get into a plane/car/train knowing that the driver/pilot/operator had just donated a urine sample of 97ng/mL…
14. We all agree that none of us would get into a plane/car/train knowing that the driver/pilot/operator had just donated a urine sample that was non-negative (i.e. before it had gone to the lab).
15. We all agree that both the above situations (points 13 and 14) are due to potential safety concerns of the operator.
16. We all agree that there is no international standard for impairment in an Occupational setting that is validated across safety critical industries (i.e. not road users).

[66] As noted, First Union takes issue with Atlas’ use of urine testing, and says saliva testing ought to be used instead. Dr Payne gave evidence that the screening cut-off concentrations in AS/NZS 4308:2008 which relates to urine testing are widely used as a measurement for drugs in workplaces. He points out the standard “Ensures that the detection of drugs in urine meets the expectations for testing of specimens for medico-legal, workplace or court-directed purposes”.[9] It is clearly common ground that the screening cut offs are not related to “impairment” and are not designed to test for impairment. Dr Payne says impairment is multifactorial and can be related or not to any drug or alcohol use. He says it is widely accepted in safety critical/sensitive industries and workplaces that the aim of a drug testing program and policy is to reduce the potential for impairment from drugs and alcohol, and only a negative result can confidently exclude impairment.

[67] The Authority is satisfied a fair and reasonable employer could have in the circumstances concluded Mr Hadfield’s non-negative test result met the definition of

[9] https://www.standards.govt.nz/shop/asnzs-43082008/.

"attending work under the influence" of drugs. I consider the phrase "under the influence" in clause 17.1.3 is imprecise and that clearer language could have been agreed by the parties which would have mitigated the potential for misunderstanding between First Union and Atlas. However, the "under the influence" phrase does not operate in a vacuum – it must be considered in light of the guidance in the policy about alcohol limits and cut-off concentrations of drugs. Schedule 6 provides a table of confirmatory test cut-off concentrations of drugs as per the AS/NZS 4308:2008 standards, with the cut-off level identified for THC-acid as 15 micrograms/litre. The same cut-offs are shown in the 2014 version of the policy, so have been in place for several years. It was clearly reasonable for Atlas, as many New Zealand employers in safety critical/sensitive industries do, to rely on urine testing as it did. It is important not to lose sight about why these tests are undertaken - for safety reasons. Atlas, as a person in control of a business or undertaking has a duty to eliminate risks to health and safety, so far as reasonably practicable. The limits of detection afforded by the ASNZS 4308:2008 guard against the potential for impairment by reducing (as far as practicable) the risk posed by drugs and alcohol.

[68] I therefore find that a fair and reasonable employer could have concluded that a return of a non-negative test above the screen cut off level of 15ng/mL for THC-COOH constituted "attending to work under the influence of … drugs". Mr Hadfield's dismissal was not substantively unjustified.

Should remedies be awarded and are there issues of contribution?

[69] Because I have found Mr Hadfield's was both unjustifiably disadvantaged in relation to his suspension and unjustifiably dismissed on procedural grounds, he is entitled to a consideration of remedies.

Lost wages

[70] Mr Hadfield seeks reimbursement of lost wages for the two week period he was suspended totalling $2,158.48. He is entitled to that amount as his suspension should have been on pay.

[71] Mr Hadfield has also claimed five weeks lost remuneration, for the period between dismissal until he found new employment, as well as the shortfall between his earnings with his new employer for a period of approximately 20 weeks. In total he

claims $10,180.98 in lost wages. I am satisfied Mr Hadfield took reasonable steps to find alternative employment and is entitled to $5,396.18 in relation to the five week period he was out of work. I also award the shortfall in wages for three months, being $1,913.92. Mr Hadfield is therefore entitled to a total of $7,310.10 in lost remuneration.[10]

Compensation

[72] Mr Hadfield seeks compensation for distress and humiliation of no less than $3,500 in relation to his unjustified suspension. I am satisfied Mr Hadfield is entitled to compensation for distress and humiliation of $3,000 in relation to the suspension.

[73] Mr Hadfield seeks compensation for distress and humiliation resulting from his unjustified dismissal. Mr Hadfield gave compelling evidence that he suffered distress and humiliation and his mental and physical health suffered as a result of the dismissal and the way in which it was carried out. An award of compensation of $13,000 is appropriate.

Mr Hadfield's admitted conduct contributed to grievances

[74] Mr Hadfield's admitted conduct undoubtedly contributed to the situation that gave rise to his grievances. His compensation awards for distress and humiliation are reduced by 20 percent.

Outcome

[75] Atlas Concrete Limited must pay Shane Hadfield the following amounts within 21 days of the date of this determination:

a. $7,310.12 in lost remuneration.
b. $16,000 in compensation under s 123(1)(c)(i) of the Act, less 20 percent for contribution.

Costs

[76] Costs are reserved. The parties are encouraged to resolve the issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Hadfield may lodge, and then should serve, a memorandum on costs

[10] Employment Relations Act 2000, sections 123(1)(b) and 128(2).

within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Atlas would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.

Sarah Blick
Member of the Employment Relations Authority